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IN THE

Supreme Court of the United States

_____ Term, 1974

No. 73-1620

JOHN R. BROWN, SR., M.D., *Petitioner*
(Rita Wright et al)

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT
ET AL, *Respondent*

PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner John R. Brown, Sr., M.D., respectfully prays that a Writ of Certiorari issue to review the final opinion and Judgment entered in this case on February 13, 1974 by the United States Court of Appeals for the Fifth Circuit, which Affirmed the Dismissal by the Houston District Court For the Southern District of Texas of both of the Plaintiffs' Amended petitions pending in that court on the grounds that said petitioners did not state a claim upon which relief can be granted.

OPINION BELOW

The initial panel opinion of the Court of Appeals affirming the District Court's dismissal is reported as Rita Wright v. The Houston Independent School District et al 486 F.2d 137 and is reproduced as Appendix D to this petition at page 50, and was entered on October 10, 1973.

JURISDICTION

Jurisdiction was based on 42 U.S.C. 1983. After affirmance of the lower Courts' Judgment as cited above, both appellants filed timely petitions for rehearing and your petitioner included with this petition for rehearing, a petition for rehearing en banc. On November 30, 1973, your petitioner's petition for rehearing and petition for rehearing en banc were both denied, and a copy of that opinion is included as Appendix E to this petition at page 52, and the other appellant's petition for rehearing was denied. (Appendix F at page 54) (487 F.2d 1401) Thereafter the other appellant filed a motion stating that her petition in fact was also a petition for rehearing en banc. Whereupon, on Dec. 17, 1973 the Court of Appeals vacated the other appellant's order of denial of the petition for rehearing until the Court could rule on her petition for rehearing en banc. Copies of this order are included as Appendix G in the Appendix of this petition at page 55. Whereupon, your petitioner filed a motion for vacation of his judgment and for a rehearing en banc in conjunction with the petition for rehearing en banc that was then pending on behalf of the other appellant, and further, for vacation of the judgment and to enter it so it would correspond with the order to be entered on behalf of the other appellant. On February 13, 1974 the court denied the other appellant's motion

for rehearing en banc. Once again, the Court denied your petitioner's petition for rehearing en banc, but granted, "his request that the court vacate its order of November 30, 1973, denying his petition for rehearing and rehearing en banc, and to reenter the order to correspond with the order to be introduced on behalf of plaintiff-appellant, Leona Weber". A copy of this order is included with this petition as Appendix H and is included at page 56 (489 F.2d 1312). This petition for writ of certiorari is timely filed within 90 days of the date of February 13, 1974. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States District Court's dismissal of both your petitioner's petition and the other plaintiff-appellant's petition on the grounds of failure to state a claim upon which relief can be granted and the United States Court of Appeals affirmance of said dismissal violate the requirements of the Rule 12b(6) of Federal Rules of Civil Procedure and the Supreme Court case of *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 21 L.Ed.2d 80, and all further cases interpreting the same.

II. Whether the United States District Court should have granted the Motion For New Trial based upon the new evidence of J. W. Edgar filed with the Court after the Judgment of Dismissal.

III. Whether both the dismissal of this case under its peculiar procedural circumstances and the Court's erroneous assumptions, and the failure to grant Plaintiffs' a Motion for a New Trial by the United States District Court in the face of the admissions of Dr. J. W. Edgar

and the subsequent affirmance by the Court of Appeals constitute an abuse of Judicial discretion.

IV. Whether the practice of the Houston Independent School District and the State of Texas complained of in the Plaintiffs' Petitions violates the establishment clause of the First Amendment and the Fourteenth Amendment to the Constitution of the United States.

V. Whether the practice of the Houston Independent School District in the State of Texas complained of in the Plaintiffs' petitions violates the Free Exercise clause of the First Amendment and the Fourteenth Amendment to the Constitution of the United States.

VI. Whether the practice of the Houston Independent School District in the State of Texas complained of in the plaintiffs' petitions violates the Freedom of Speech clause in the First Amendment and the Fourteenth amendment of the Constitution of the United States.

VII. Whether the practice of the Houston Independent School District and the State of Texas complained of in the Plaintiffs' petitions violates the civil rights of the students, the law of 28 U.S.C. 1331, 1343, 42 U.S.C. 1983, 85.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the First and Fourtenth Amendments to the Constitution of the United States and Rule 12b(6) of Federal Rules of Civil Procedure and 28 U.S.C. 1331, 1343, 42 U.S.C. 1983, 85 and 28 U.S.C. 1254(1) are reproduced in Appendix I at page 59.

STATEMENT OF THE CASE

John R. Brown, Sr., M.D. as Intervening Plaintiff and as next friend of John R. Brown, Jr. (and later filing as next friend of Carol Kay Kirkland, Nancy Kirkland and Melissa Kirkland) filed his Intervening Plaintiff's First Amended Original Petition in which he not only adopted the original Plaintiff's Second Amended application for Permanent Injunction but pled—in addition to the Jurisdiction of the District Court of this Constitutional Question and this suit as a class action—nine specific facts that constituted his separate but parallel cause of action with that of the original Plaintiffs.

Both the original Plaintiff's Petition which was adopted and Plaintiff's independent but parallel petition asked for injunctive relief, permanently enjoining all defendants named in this lawsuit from "continuing to teach the theory of Evolution" in any manner of teaching, instructing, supplying and using textbooks that presents the theory of Evolution in the manner specifically pled in Paragraph V., Points 1 through 9 of "Plaintiff's First Amended Original Petition". Plaintiff further pled for such remedies of the Court that neither "violate the First Amendment Doctrine of Neutrality and the Fourteenth Amendment in theory nor has the practical effect of violating the theory of neutrality;" or in the *alternative*, we further pled that if the "theory of Evolution be taught, that the Court place such safeguards upon the teaching that it is taught with a critical analysis and that the other scientific alternatives and evidences be taught also."

Basically, your Plaintiffs are asking that a position of neutrality be reached with reference to both religious-philosophical-scientific theories of Evolution And Creation

in the classrooms of the Houston Independent School District and in the books and teaching materials of the state of Texas. Our position is that Evolution is not fact; that, at best, it is only equal, if not inferior to the scientific theory of Creation in terms of the evidence to support it; that despite this it is taught with the total effect as a fact and to the exclusion of the other better theory; that it is mandatorily taught—with the end result of compulsion; that if this theory is opposed or the scientific theory of Creation is advanced by the student he is subjected to possible or actual ridicule or to being intellectually snubbed; that the theory of Evolution is a central doctrine in atheistic philosophy, atheistic religious thought or form or forms of religion; that the manner of its teaching has made evolution a sectarian doctrine; that these foregoing points violate the doctrine of neutrality on that the manner of its teaching is either preferring one religion over another or, alternatively, irreligion over religion. Further the petition pled that the—State has rejected books that bring these alternatives into more proper balance and that these rejections coupled with the manner of instruction and handling of the unproved theory of evolution is not secular in purpose, evenhanded in operations, nor neutral in its primary effect upon the students receiving this instruction which violates the first and fourteenth amendments to the Constitution of the United States.

The lower Court entertained this case for approximately two years. Much of this time is attributable to the fact that the original Plaintiff was not represented by counsel at various times. However, for a part of the time, both original Plaintiff and Intervening Plaintiff were given a docket control order for the preparation of the case to trial. The trial was set for the month of September, 1972.

Your Plaintiff proceeded to prepare according to docket control order, and these events followed:

1. A hearing was held on June 21, 1972 and at that time there were three motions that had been before the court for sometime. The notice for hearing before the judge did not state which motion of the following motions would be considered: the Defendant's motion to dismiss for want of jurisdiction, motion to dismiss for failure to state a claim on which relief can be granted and the Plaintiff's motion that the case be considered as a class action; nor did it state whether or not there would be testimony by witnesses. The hearing took only 63 letter size pages of transcript to record, after the first ten pages of sorting out the Parties and the last 6 pages of procedure, the remaining 47 pages were devoted to a short statement by each of Five Parties of what their positions were in small-capsule. Needless to say, a full and complete hearing on any of the three motions pending before the Court was not had, nor was any evidence other than your counsel's personal belief determined by the Court.

On July 21, 1972 deposition was taken of Dr. J. W. Edgar, Texas Commissioner of Education Texas State Board of Education, Austin, Texas, in which he made certain damaging admissions as to consistent practice in choosing textbooks including evolution but excluding creation, neutrality, and exemption. Depositions of three members of the Houston Independent School District School Board were scheduled for oral Deposition for August 4, 1972. (August 11, was the deadline, the Court had given for completing discovery). Defendants filed a Motion to Quash Oral Depositions on August 2 or August 3, 1972. The Judge signed an Order Quashing the Oral Depositions on August 3, 1972 at 3:30 P.M. the Judgment

was dated August 3, 1972, 366 F. Supp. 208, which is included as Appendix A at page 27. Both Plaintiffs filed Motions For New Trial. Your Plaintiff's motion is included as Appendix B at page 38 and the Order Overruling same entered on September 8, 1972, from which your Plaintiffs timely appealed is included as Appendix C at page 48.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals to affirm the trial Court's dismissal for failure to state claim upon which relief can be granted conflicts not only with this Court's decision in *Conley v. Gibson*, but with their own interpretation of this case.

Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 21 L.Ed. 2d 80 (1957) controls, being well settled law, that "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. 45, 78 S.Ct. 102, 2 L.Ed.2d 84. *Jenkins v. McKeithen*, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969), not only affirms *Conley* but states also the equally well accepted principle, "For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted. 395 U.S. 421, 89 S.Ct. 1849, 23 L.Ed.2d 416. The case of *Czosek v. O'Mara*, 397 U.S. 25 at 27, 90 S.Ct. 770 at 772, 25 L.Ed.2d 21 at 24 (1970), states that " 'where the courts are called upon to fulfill their role as primary guardians of the duty of fair representation,' complaints should be constructed to avoid dismissals and the plaintiff at the very least 'should be

given the opportunity to file supplemental pleadings unless it appears beyond doubt that he cannot state a good cause of action.' "

Until now, this has been faithfully followed in the Fifth Circuit in such a great quantity of cases speaking so positively in their perfect obedience to the above cited cases that it seems almost unnecessary to cite them. But the language in *Cook & Nichol, Inc. v. Plimsoll Club* seems so particularly pungent that we quote from 451 F.2d 505 at 506-7, John R. Brown, Chief Judge:

> "This heated controversy over aircooling the members of New Orleans Plimsoll Club proves again that a complaint above the Plimsoll line may not be dismissed for failure to state a claim. It reminds us of the need for periodic exercise, for over and over again—but apparently not often enough—the Court has stated, explained, reiterated, stressed, rephrased, and emphasized the simple, long established, well-publicized rule of Federal practice: a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would not be entitled to recover under any state of fact which could be proved in support of his claim . . . just to name five of the more than sixty cases which this Court alone has reversed since 1938 after a Trial Court had dismissed the complaint for failure to state a claim upon which relief could be granted. Still, with regularity, case after case comes before this Court where a complaint has been dismissed on "barebones pleadings" alone, and casualty count continues to soar."

The Chief Justice's admonition was not heeded because other cases above the "Plimsoll line" have come down reaffirming that line among which are *Matthews v. United*

States, 456 F.2d 395 (1972), *Hines v. Delta Air Lines,* 461 F.2d 576 (1972), *Lipscomb v. Jonsson,* 459 F.2d 335, (1972), *Scarpa v. U. S. Board of Parole,* 408 F.2d 31 (1972), *Brett v. First Federal Savings & Loan Association,* 461 F.2d 1155 (1972).

Both the number of cases and the strength of the language of these same cases attest to the fact that dismissal on these grounds should not be done except in extreme cases where barebones pleadings have been allowed to be filled out and where there is absolutely no set of facts which accepted as admitted would present a claim upon which relief could be granted. We respectfully submit that there is no way this could be true of this case at issue. We were not apprised of the purpose of the hearing before the Judge. Only a brief statement of the issues from the attorneys are allowed. The only thing that could be called testimony was that of your counsel in this petition when the Judge asked him of his personal beliefs. No opinion, no ruling was handed down. We proceeded to discover according to the Docket Control Order; one deposition was taken of the Commissioner of the State Board of Education; Depositions were scheduled for the members of the Houston School Board; a Motion to Quash was filed by defense counsel, and the Judge summarily handed down the Judgment in the matter to the complete surprise of your Plaintiffs. This Judgment contained little criticism of your Plaintiff's petitions and there was absolutely no opportunity to amend or supplement. Your counsel filed a Motion For A New Trial (Appendix B) with affidavit based on the Commissioner's deposition which had not yet been filed at the time of the dismissal. This Motion was overruled. Timely appeal was perfected, whereupon the Court of Appeals added to the casualty

count it remonstrated against in the above quotation from the *Plimsoll* case. The Federal Forum that should have been open to us was wrongfully denied in conflict with the cases above cited.

That this is a Federal Question that should be decided in the Federal Forum there can be little doubt. In *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 at 659 S.Ct. 1178 at 1195, 87 L.Ed. 1628 at 1648 (1943), Mr. Justice Frankfurter, in objecting to the Court's holding that the Jehovah's Witness did not have to salute the flag, judicially foretold that the *Everson v. Board of Education* case, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed.2d 711 (1947), a form of the *Abington Tp., Pa. v. Schempp,* 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), and this particular case at bar, all might come before this Court. In *Cruz v. Beto,* 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972), this Court rightfully thought that it was a Federal question to protect the rights of a member of a minority, in this case the Buddhist religion. Surely, a fundamental doctrinal belief of millions of people and their children would at least present an issue to be tried by the Courts.

But even more compelling is the statement of Mr. Justice Black in the *Epperson v. Arkansas* case at 393 U.S. 113, 89 S.Ct. 275, 21 L.Ed.2d 240 that:

> "A second question that arises for me is whether this Court's decision forbidding a State to exclude the subject of evolution from its school infringes the religious freedom of those who consider evolution and anti-religious doctrine."

Ths is exactly the question we raise. And the fact that Mr. Justice Black sees the question of infringement refutes

the lower courts that held that we have no Federal Question.

The Northwestern Law Review Symposium, cited below, in the treatise on Humanistic Values in Public School recognizes the problem when humanistic religions have "identical goals" with the educational process. p. 56 (814). The manner that the Educational process has chosen to solve the problem has caused this law suit.

Dean Robert F. Drinan, in his Treatise, "Aid to Parochial Schools—Constitutional", *The Wall between Church and State,* The University of Chicago Press, Chicago and London, 1963 at pages 68 and 69, asks the question, "Can religionists claim further that the state, by assisting only the secularized school, subscribes to and promotes an orthodoxy which to whom, by law, the state has given a pledge of a free education unaffected by any official indoctrination?" He seemingly answers his own question, "Preferential treatment of irreligion would seem to be as constitutionally objectionable as any preference given to religion". Then he poses the other side to the problem with the observation,

> "The widespread and deeply held conviction persist that silence about religion in the public school is the same as neutrality or impartiality. On this basic conception is built the whole thesis that the public school can be fair to believers and non-believers by assuming that their difference for the purposes of education are without significance. It is this basic assumption of the public school which, it is submitted, violates the letter and the spirit of the establishment clause."

The problem is real to millions of people who may differ on the remedy—but not the problem. The remedy we

prayed for which we will discuss later in detail would have the effect of ameloriating the problem Dean Drinan raises by removing one objection to the public schools, i.e., the fact that it establishes the state religion of secular humanism by the doctrinal teaching of evolution only. Had the lower courts realized this thrust of the problem, perhaps they would not have said, by dismissing the case, that it does not exist.

Although the Courts did not say so, perhaps, they were concerned lest there be a trial on the basis of the *Scopes* case. The *Scopes* case was tried at least partly, on the religious issue of the Bible v. the mere teaching of evolution. It was not cast in the framework that it is today, whereby, with no prohibitions on it, evolution is taught as a religion to the exclusion of all other scientific truth. What we ask is equitable enough: all scientific truth be taught without a religious esablishment of either the Bible or Secular Humanism. Succinctly put, we object to the manner in which evolution is taught so that the student feels that it is the "absolute truth", and that by the omission of the great body of other truth, the student feels that evolution is the "only truth" and the schools teach him to worship "that truth".

How Did The Courts View The Problem?

First of all, let it be pointed out that neither the District Court nor the Court of Appeals made any procedural criticism as to the sufficiency or the manner of the petition with the exception that the District Court said that we did not plead the policy of the school board. (In our Motion For New Trial, we pled a de facto policy so that this is not an issue in this Court.) The Court of Appeals

as did the District Court turned the case on *Epperson v. Arkansas,* 393 U.S. 97, (89 S.Ct. 267, 21 L.Ed.2d 2288 (1968), with the Court of Appeals saying that the "Federal Courts cannot by Judicial decree do that which the Supreme Court has declared the state legislatures powerless to do, i.e., prevent teaching the theory of evolution in public school for religious reasons."

Epperson only struck down a State Statute making it a criminal offense; it cannot be used to foreclose this case. *Epperson* did not envision evolution itself becoming a religious doctrine by the way it is taught or how it is considered by its devotees.

This, being an altogether different question is controlled by the tests of Neutrality and Free Exercise. The issue that we ask the Court to address itself to is well expressed by one of our expert witnesses, Henry M. Morris, Ph.D., former Professor of Hydraulic Engineering and Chairman of the Department of Civil Engineering at the Virginia Polytechnic Institute and State University and who is now President of the Creation Research Society who stated in his article "Evolution, Creation, and the Public Schools", *Impact Series,* Institute for Creation Research, San Diego, California, 1973,

> "One of the most amazing phenomena in the history of education is that a speculative philosophy based on no true scientific evidence could have been universally adopted and taught as scientific fact, in all the public schools. This philosophy has been made the very framework of modern education and the underlying premise in all textbooks . . .
>
> Evolution is, therefore, neither fact, theory, nor hypothesis. It is a belief—and nothing more . . .

When creationists propose, however, that creation be taught in the schools along with evolution, evolutionists commonly react emotionally, rather than scientifically. Their "religion" of naturalism and humanism has been in effect the established religion of the state for a hundred years, and they fear competition . . .

Neither evolution nor creation is accessible to the scientific method, since they deal with origins and history, not with presently observable and repeatable events. They can however, be formulated as scientific models, or frameworks, within which to predict and correlate observed facts. Neither can be proved; neither can be tested. They can only be compared in terms of the relative ease with which they can explain data which exist in the real world . . .

There are, therefore, sound scientific and pedagogical reasons why both models should be taught, as objectively as possible, in public classrooms, giving arguments pro and con for each. Some students and their parents believe in creation, some in evolution, and some are undecided. If creationists desire only the creation model to be taught, they should send their children to private schools which do this; if evolutionists want only evolution to be taught, they should provide private schools for that purpose. The public schools should be neutral and either teach both or teach neither . . .

Nevertheless, creationism is actually a far more effective, scientific model than evolutionism, and evolution requires a far more credulous religious faith in the illogical and unproveable than does creation. An abundance of sound scientific literature is available today to document this statement, but few evolutionists have bothered to read any of it. Many of those who have read it have become creationists!"

II. The District Court should have granted your Plaintiff's Motion for New Trial, based upon the new evidence it contained.

The Motion for New Trial contained three basic thrusts:
1. It clarified the misunderstandings and the errors that the Court entertained with reference to our position.

2. It supplied the pleading that there is a de facto policy by the school board which was partially shown by Dr. J. W. Edgar's testimony that there was a "consistent practice" in having books that did not have the theory of Creation in them.

3. The whole of Dr. Edgar's deposition should have been sufficient to have caused the new trial to have been granted especially in view of the testimony, concerning:

A. The "Consistent practice" in having only evolution in school books.

B. The admission by Dr. Edgar that teaching both would be a fair and equitable policy.

C. The admission by Dr. Edgar that the exemption proposed by the District Court would subject the child to ridicule.

Dr. Edgar's testimony admitted a large part of the pleading of our petitions—and yet with this admission, it was allowed to remain dismissed "for failure to State a claim".

III. We submit that it was an abuse of judicial discretion to be that near a trial on the merits, with discovery near completion, on such a scanty hearing, without opportunity of witnesses, in the face of Dr. J. W. Edgar's admission of a good part of our petition, with no opportunity to amend or supplement the petition, and then to be dismissed for the reason the Court gave.

When the Federal Forum is closed to the cry of infringement of Federal rights, then what opportunity does the individual have for his petition for redress to be heard? And under these circumstances there must be some limit to Judicial discretion; and we respectfully submit that the Courts exceeded it.

IV. & V. The Practice of the State of Texas and the Houston Independent School District in the providing of textbooks and the method of teaching violates both the Establishment and Free Exercise Clauses of the First Amendment and the Abridgement and Equal Protection Clauses of the Fourteenth Amendment.

Although separate points, we consider them together because the set of facts and most of the tests are common to both. The test of the Establishment clause is that of neutrality.

Abington Tp., Pa. v. Schempp, 374 U.S. 203, 83 Sup. Ct. 1560, 10 L.Ed.2d 1844 (1963), *Epperson v. Arkansas,* 393 U.S. 97, 89 Sup. Ct. 267, 21 L.Ed.2d 2228 (1968), *Gillete v. United States,* 401 U.S. 437, 91 Sup. Ct. 828, 28 L.Ed.2d 168 (1971), *Tilton v. Richardson,* 403 U.S. 672, 91 Sup.Ct. 2091, 29 L.Ed.2d 79

(1971), *Wisconsin v. Yoder,* 406 U.S. 205, 92 Sup.Ct. 1526, 32 L.Ed.2d 15 (1972), speak of the constitutional test of neutrality with reference to the establishment clause. *Schempp* at 374 U.S. 222, 83 Sup.Ct. 1571, 10 L.Ed.2d 858, set forth the two tests: 1. There must be a secular purpose, and 2. a primary effect that neither advances nor inhibits religion. *Tilton v. Richardson,* at 403 U.S. 678, 91 Sup.Ct. 2096, 29 L.Ed.2d 799 sets forth the third test of whether the activity fosters an excessive government entanglement with religion and the fourth test of whether the implementation of the act inhibits the free exercise of religion. *Yoder* at 406 U.S. 220, 92 Sup.Ct. 1536, 32 L.Ed.2d 28, speaks in terms of whether or not it unduly burdens the free exercise of religions.

The general theory of evolution is not just concerned with man; it is a "grand and glorious" cosmological study of origins that includes 1. The evolution of the chemical elements from primeval energy 2. Evolutional stars and galaxys 3. Evolution of the solar system 4. Evolution of life from non-living chemicals 5. Evolution of complex forms of life from simple form 6. Evolution of man from ape like ancestor 7. The evolution of culture. *Handbook on Creation and Modern Science,* Henry M. Morris, et al, Institutional for Creational Research, California, 1973 pages 5 & 6. This total theory with the aid of U. S. Government funds has been specially presented in a comprehensive fashion in a series of textbooks that make a concerted effort to teach the total theory. These textbooks coupled with the consistent pattern of exclusion of the theory of creation materials coupled with the de facto policy of the Houston Independent School District and methods of teaching reinforced by methods of supervision all combined to present the total idealogical brain-

washing effect upon the minds of the children. The complete evangelistic fervor of the evolutionists have long ago transformed evolution from the secular to the religious. The *Seeger* case. 380 U.S. 163 at 166, 85 Sup. Ct. 850 at 854, 13 L.Ed.2d 733 at 739 (1965) spoke of "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in purely ethical sense" as a "religious belief". *Torcaso v. Watkins,* 367 U.S. 488 at 496, 81 S.Ct. 1680 at 1684, 6 L.Ed.2d 982 at 987. The Court observed in footnote 16 "that among religions in this country which do not touch what would be generally considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism. and others." Evolution is a religious belief that promotes "goodness for its own sake" and is the subfoundation and the corner stone for secular humanism.

The second test is that primary effect that neither advances nor inhibits religion. The trial court referred to evolution as a "so nebulous an intrusion". How does the trial court know this? Only those who have taught and helped to further the growth of religions believing in the scientific theory of creation could know how detrimental and injurious the religion of evolution is to the minds of our children. It is unfortunate that the trial Court in their footnote 6 compared the scientific theory of creation to the Mormon belief in the inequality of the races and the Christian Science view of health and disease because there is no comparison. The above mentioned views belong to individual Sects whereas the theory of Creation belongs not only to orthodox Christians, but to Jews, and Mohammedans as well. Orthodoxy belongs to Roman Catholics, Greek Catholics, Episcopalians, Mormons, Baptists and many others. It cuts across all church lines.

All religions may be divided into just two groups: the evolutionist and creationist. Secondly, there is not a body of scientific evidence equal to or surpassing medical science in the case of the Mormon or Christian Scientist view, as exists in this instance, where the body of creational science is superior to that of evolutional science. It is regretable that the courts had such a view; perhaps, this is the reason why it was referred to as a "nebulous intrusion." Admittedly this is a fact question, but one that should not have been precluded by the trial courts erroneous assumption as to the total effect. The third test is whether or not it fosters an excessive government entanglement with religion. Our expert witness states that evolution has been the state established religion for years. Without the power of the U. S. Government subsidizing the textbooks that we complain of, and without the States power to promote those textbooks while excluding those teaching the scientific theory of creation, and without the States money in this lawsuit upholding it, the religion of evolution would have remained where it originally was—merely an idea to provoke discussion.

Our claim that it violates the free exercise clause would surely meet the fourth test of not unduly burdening this clause. The *Schempp* case speaks of the "right of every person to freely choose his own course with reference thereto free of any compulsion from the State. This the free exercise clause guarantees. Thus, as we have seen, the two clauses may overlap." 374 U.S. 222, 83 Sup. Ct. 1571, 10 L.Ed. 858. All elements of compulsion are here; it is necessary to attend school both by statute and practical necessity. It is the only theory taught. It is the only thing contained in the textbook. The prejudices of the

teacher are obvious, the desire for a good grade is imperative and the peer influence is overwhelming. As the frog can be boiled alive by slowly and imperceptively increasing the heat under the pan, so, in the same manner all opposition to the religious doctrine of evolution and the religion of secular humanism is extinguished. To avoid the ridicule of both the teachers and their own group, the students docilely allow their minds to be conformed to the one religion of evolution—secular humanism. How could the Court in a few minutes of time ascertain that no compulsion was involved?

The language of Schempp almost totally throughout the whole case is in point with our position if you would delete the word "practice" from *Schempp* and substitute the phrase "Central Religious Doctrine". The Court in Schempp said of the amendment, "at 374 U.S. 217 and 18, 83 S.Ct. 1569 and 10 L.Ed.2d 855, quoting from Everson:

> " 'In short, the Court held that the amendment 'requires the State to be a neutral in its relations with groups of religous believers and non believers it does not require the State to be their adversary. State power is no more used so as to handicap religions than it is to favor them. Id., 330 U.S. at 18, 67 S.Ct. at 513, 91 L.Ed 711' "

We could not have stated our position any better.

Yoder deals with a religious belief being in conflict with the State's conception of its requirement. As in *Schempp*, the total language of *Yoder* is exactly our position. If you would substitute the words, "the belief of creation", for words "the Amish belief" and the word "evolution" for the words "higher learning", one could read the Amish

case totally as stating our position. The way that they feel that education above the eighth grade endangers their salvation is the same way we feel that the doctrine of evolution not taught critically and given the truth on the other side endangers the salvation of our children, and thus of ourselves as well. We hold to this belief as sincerely and as devoutly as do the Amish. The only difference in our beliefs is that they withdraw from the world in separate communities; whereas our belief is that we must move about in the world, only holding ourselves aloof from the standpoint of worldly values. As we ask the Court of Appeals, "Are we to be denied the protection of the Constitution because we do not withdraw in a monastic group aloof from the physical world? Are we to have prejudiced religious values taught to us as our reward for moving in the main stream of the society and contributing to it directly, to the government that controls it, and to the armed forces that protect it? The only basic difference between the belief of the Amish and the belief of the creationist that we are espousing is the manner of its manifestation to the world" (The Original Appellants Petition for Rehearing, pp. 10 and 11).

The District Court suggested the remedy of exemption neither Dr. J. W. Edgar nor *Schempp* at 374 U.S. 224-225, 83 Sup.Ct. 1573, 10 L.Ed.2d at 859 agree with the lower Court: "Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request for the fact changes no defense of unconstitutionality under the establishment clause."

In *Engle v. Vitalie,* 370 U.S. 421, 825 S.Ct. 1211, 8 L.Ed.2d 601, *Schempp,* and the *Yoder* cases this Court has gone to great length to safeguard and protect

the free exercise of the individual's religion. We feel that compared to a major religious doctrine that can change the lives of children the Bible reading and the prayer although rightfully excluded, are small and innocuous. The testimony of the expert witnesses that we would produce would testify to both the gravity and the peril of the situation as it continues to increase. We cannot help but feel that had the lower Courts read the letter with the spirit of *Schempp* and *Yoder* we would not have been summarily dismissed. The Court in *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 at 95, 92 S.Ct. 2286 at 2290, 33 L.Ed.2d 212 at 216 (1972), set out the following test for the Fourteenth Amendment.

> "As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment. See Reed v. Reed, 404 U.S. 71, 75-77, 92 S.Ct. 251, 253-254, 30 L.Ed.2d 225 (1971); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972); Dunn v. Blumstein, 405 U.S. 330, 335, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (1972)."

We submit that there is differential treatment between the two theories, and that establishing a state religion is not an appropriate governmental interest.

VI. The practice of both the State of Texas and the Houston Independent School District above referred to are in violation of the Freedom of Speech Clause of the First Amendment to the Constitution of the United States.

Freedom of speech must have the concommitant right of the freedom to know. Unless one knows he cannot

discuss fully the ideas. The second way that this clause is violated is by either the discouragement or the ignoring by the teacher when the student begins to discuss. In *Tinker v. Des Moines Independent School District*, 393 U.S. 503 at 506, 895 S.Ct. 733 at 736 (1969), 21 L.Ed.2d 731 at 737. Neither "students nor teachers shed their constitutional rights to freedom of speech or expression at the school house gate." In Police Department of the City of Chicago the premise is articulated that "government has no power to restrict expression because of its message, its ideas, its subject matters, or it content. 408 U.S. 92 at 95, 92 S.Ct. 2286 at 2290, 33 L.Ed.2d 212 at 216 (1972).

CONCLUSION

We cite the practice of the school system as violative of both the establishment and the free exercise clause with some appreciation of the Courts dilemma in these areas. Allowing that we can prove what we contend we can, then the Courts alternatives in this point would be four: 1. Whether to allow the continuance of secular humanism as a religion to be taught in the schools. It would seem that all those objecting to secular humanism would be in agreement here that this should not continue. 2. The second alternative is that the Court begin direct aid to religious private schools. To us, and to the Court this has been totally unacceptable although the Court has allowed incidental, indirect aid to the schools. 3. The next alternative is that there would be no ideas taught at all which produces the effect of "value sterility" as noted by the *Northwestern Law Review Symposium*, Rice, *Supreme Court in public prayer* (1964), The DeCapo Press (1971) Vol. 61, No. 4, page (808)

& 50. Equity and fairness would demand that if the scientific model of creation is not taught then neither should the scientific model of evolution be taught. However from an educational standpoint it would produce "value sterility". The student would not be apprised of either model of thought nor would he have an opportunity to gather the evidence around each model with a critical analysis of both the pros and cons of that evidence, and then to arrive at an intelligent conclusion based upon the evidence presented. From equitable and religious standpoints it would be acceptable. Albeit, there are those who would object from an educational standpoint. 4. That which is the alternative pleadings in your counsel's first amended petition namely that both scientific models be taught fairly with a critical analysis and examining all facets of the evidence is the fourth alternative. Equitably, religiously and educationally there would seem to be no objection. Dr. J. W. Edgar stated in his deposition that he thought it would be a fair and equitable policy and much better than an exemption. However, the trial court found that exemption was better and that teaching both would be an "onerous burden". We simply answer this charge by pointing out that there are school districts in the United States that do not find it to be so. This is another line of evidence that would be presented when trial is allowed. Mr. Justice Clark, speaking for the Court in *Schempp* at 374 U.S. 225, 83 Sup.Ct. 1573, 10 L.Ed.2d 860, stated:

> "Nothing we have said here indicates that such study of the Bible or of religion when presented objectively as part of a secular program of education may not be effected consistently with the first amendment."

All that we ask for here is what the court speaking through Mr. Justice Clark said was acceptable, namely *the objective method.*

Wherefore premises considered the petitioner respectively urges that this petition for the Writ of Certiorari be granted, or in the alternative, the remedy that your petitioner prayed for in their petition be granted, or in the alternative that the case be remanded to the District Court for a trial upon the merits.

Respectfully submitted,

HERBERT L. COFFMAN
Attorney for the Original Appellant and the Intervening Plaintiff, Dr. John R. Brown, M.D.
5757 Bellaire Blvd., Suite 203
Houston, Texas 77036

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Appellant's Reply Brief has been served on Mrs. Leona Weber pro se, 6801 Avenue C, Houston, Texas 77011; Mr. Kelly Frels, Attorney for Appellees Houston Independent School District, Et al, 1808 First City National Bank Bldg., Houston, Texas 77002; Mr. Bruce Youngblood, Assistant Attorney General of Texas, Attorney for the State Board of Education, the State Commissioner of Education, and the Central Education Agency, Box 12548, Capitol Station, Austin, Texas by United States Mail with sufficient postage thereon this the _____ day of April, 1973, A.D.

APPENDIX A

United States District Court
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RITA WRIGHT, ET AL

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT, ET AL

CIVIL ACTION NO. 70-H-1236

Leona Weber, Pro Se
James K. Kelly, Houston, Texas
For the Plaintiffs

Herbert Coffman, Houston, Texas
For the Intervening Plaintiff

Bracewell & Patterson (William Key Wilde and Kelly Frels), Houston, Texas
James C. McCoy, Assistant Attorney General, Austin, Texas
For the Defendants

August 3, 1972

MEMORANDUM AND ORDER:

Plaintiffs—students of the Houston Independent School District—here seek to enjoin the District and the State Board of Education from teaching the theory of evolution as part of the District's academic curriculum and from adopting textbooks which present that theory without critical analysis and to the exclusion of other theories

regarding the origins of man. Plaintiffs base their claim for relief upon the provisions of 42 U.S.C. §1983. Jurisdiction is invoked pursuant to 28 U.S.C. §1343. The case is presently before the Court on Defendants' motion to dismiss for failure to state a claim.[1]

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1. This case has been repeatedly delayed by a number of unfortunate circumstances. The principal Plaintiff, Mrs. Leona Weber, an obviously sincere and concerned parent, initiated the suit on November 17, 1970. A month later, the original counsel withdrew and a second attorney took up the case. Defendants filed their motion to dismiss on January 22, 1971. On March 29, 1971, a pretrial conference was held and the case was set on the Court's October trial assignment. On June 2, 1971, Mrs. Weber's second attorney asked for permission to withdraw. Upon granting this request, the Court directed Plaintiffs to submit the name of a new attorney within ten days. At Plaintiffs' request, the Court extended this date to August 1, 1971. Since Plaintiffs had not by that date been able to employ counsel, the Court granted a further indefinite extension, but set the case for the November trial assignment. The Court was notified on October 20, 1971, that Plaintiffs had retained new counsel, who requested and received permission to continue the case from the November docket. On November 17, 1971, however, this third set of attorneys asked for leave to withdraw, and the Court granted the motion. On December 6, 1971, the case was passed, at the request of Mrs. Weber, to the February 1972 trial assignment. Mrs. Weber agreed in open court that the case, if not prosecuted at that time, would be dismissed. At the February docket call, Plaintiff John R. Brown moved to intervene, which motion was opposed by Mrs. Weber. The Court granted Dr. Brown permission to intervene on March 27, 1972. Meanwhile, on February 28, 1972, Mrs. Weber had re-employed her original attorney. That attorney sought to withdraw as Mrs. Weber's counsel on April 5, 1972, although he would continue to represent Mrs. Drew. The Court granted leave to withdraw on April 13. On May 9, 1972, Mrs. Weber informed the Court of her inability to employ counsel, and, at her request, the Court granted her leave to proceed pro se. On June 14, 1972, Mrs. Weber, Mrs. Drew, and Dr. Brown each sought to bring in additional plaintiffs. On June 21, 1972, the Court held a hearing on Defendants' motion to dismiss, and subsequently, the case was taken under advisement. Leona Weber, on July 24, 1972, noticed the defendants of the intention to take oral depositions of Dr. George Garver, Dr. George Oser and Dr. Leonard R. Robbins on August 4, 1972, and the Court, on August 3, 1972, granted defendants' motion to quash the depositions.

Plaintiffs' principal contention is that the teaching of the theory of evolution in the Houston Independent School District inhibits Plaintiffs in the free exercise of their religion and constitutes an "establishment of religion," in contravention of the first amendment to the United States Constitution.[2] The theory of evolution is, according to Plaintiffs, presented by Defendants without critical analysis and without reference to other theories which purport to explain the origin of the human species. The "other theory" whose case Plaintiffs here champion is the explanation derived from the Bible, the basis of which is that man was created by God. In Plaintiffs' view, the theory of evolution is so inimical to the Creation account that its presentation as part of the academic curriculum should be deemed a direct attack upon Plaintiffs' religious beliefs by an organ of government. The State, by implicity rejecting a central tenet of Plaintiffs' religion, is holding that religion up to contempt, scorn, and ridicule, and is thus acting to discourage, if not to restrain, Plaintiffs in the free exercise of their religion.

Plaintiffs also argue a constitutional deprivation in terms of the Establishment clause of the first amendment. Plaintiffs maintain that, by restricting the study of human origins to an uncritical examination of the theory of evolution, Defendants are lending official support to a "religion of secularism."[3] Under the guise of scientific theory, Plain-

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2. The first amendment reads, in pertinent part:
"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *"
The Supreme Court first recognized the applicability of this provision to the States in a concurring opinion by Justice Cardozo in *Hamilton v. University of California*, 293 U.S. 245 (1934).

3. In *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), the Supreme Court held that the State may not establish

tiffs submit that Defendants are engaged in the propogation of a doctrine that is fundamentally religious in nature and thus, are "establishing" a particular religion in contravention of the first amendment.

Plaintiffs contend that Defendants' teaching of the theory of evolution violates the doctrine of neutrality which the Supreme Court has held must be State policy in matters of religion.[4] The principle of neutrality was most recently affirmed by the Court in *Epperson v. Arkansas*, 393 U.S. 97 (1968). In that case, the Court struck down an Arkansas statute which prohibited any teacher in a state school from teaching the theory of evolution. The Court had

> " * * * no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man." *Epperson*, supra, at 107.

Such a statute, since it

> " * * * was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read,"

could not pass the test of religious neutrality whose standard the Constitution requires all organs of government to uphold. *Id.*, at 109.

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a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion and thus preferring those who believe in no religion over those who do believe.

4. See *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963).

Plaintiffs have thus attempted to draw an analogy between the Arkansas prohibition and the teaching of the theory of evolution in the Houston Independent School District. From that position, Plaintiffs would suggest an appropriately analagous remedy: an injunction against the teaching of the theory of evolution. But Plaintiffs have wholly failed to establish the analogy.

In the first place, Arkansas chose to promote a particular view regarding human origins by means of legislative enactment. It was clear to the Supreme Court

> " * * * that fundamentalist sectarian conviction was and is the law's reason for existence." *Id.*, at 108.

Defendants, however, are not acting pursuant either to State law or school district regulation. Plaintiffs have not alleged that there exists even a school district policy regarding the theory of evolution. All that can be said is that certain textbooks selected by school officials present what Plaintiffs deem a biased view in support of the theory. This Court has been cited to no case in which so nebulous an intrusion upon the principle of religious neutrality has been condemned by the Supreme Court.

Neither have Plaintiffs alleged that Defendants attempt to discourage the free discussion of the subject of human origins. There has been no suggestion that Plaintiffs, or any other students, have been denied the opportunity to challenge their teachers' presentation of the Darwinian theory. Arkansas, on the other hand, prohibited any discussion of the subject of evolution.

In short, whereas Arkansas labelled as a criminal offense the mere reference to an entire body of scientific

opinion, neither the State of Texas nor the Houston Independent School District has given legislative expression to any view of the subject of evolution. The State, at most, has a general policy of approving textbooks which present the theory of evolution in a favorable light. No position regarding human origins is even indirectly proscribed by State or District. Furthermore, Plaintiffs have failed even to assert the suppression of opposing ideas. Clearly, Defendants' "policy" (or lack thereof) regarding the theory of evolution is far removed from Arkansas' blanket censorship.

Plaintiffs' case depends in large measure upon their demonstrating a connection between "religion," as employed in the first amendment, and Defendants' approach to the subject of evolution.[5] The Court is convinced that the connection is too tenuous a thread on which to base a first amendment complaint.

In *Cornwell v. State Board of Education*, 314 F.Supp. 340 (D. Md., 1969), aff'd, 428 F.2d 471 (C.A. 4, 1970), a group of Baltimore children and their parents sought to enjoin the enforcement of a bylaw, adopted by the State Board of Education, requiring "the local school system to provide a comprehensive program of family life and sex education in every elementary and secondary school for all students." Among other contentions, the Plaintiffs asserted that the sex education program constituted an establishment of religion and that its implementation denied to them the free exercise of their religious beliefs. Reminding Plaintiffs that the first amendment does not say

5. In *Davis v. Beason*, 133 U.S. 333, the Supreme Court said that "The term 'religion' has reference to one's view of his relation to his Creator, and to the obligations they impose of reverence for his being and character and of obedience to his will." *Id.*, at 342.

that in all respects there must be a separation of church and state, the District Court applied the test devised by the Supreme Court in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), for determining the validity of a legislative provision under the Establishment Clause of the first amendment:

> "[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." *Schempp*, supra, at 222.

The *Cornwell* court was convinced that the

> " * * * purpose and primary effect of the bylaw here is not to establish any particular religious dogma or precept, and that the bylaw does not directly or substantially involve the state in religious exercises or in the favoring of religion or any particular religion." *Cornwell*, supra, at 344.

In the case at bar, the offending material is peripheral to the matter of religion. Science and religion necessarily deal with many of the same questions, and they may frequently provide conflicting answers. But, as the Supreme Court wrote twenty years ago, it is not the business of government to suppress real or imagined attacks upon a particular religious doctrine. *Burstyn v. Wilson*, 343 U.S. 495, 505 (1952). Teachers of science in the public schools should not be expected to avoid the discussion of every scientific issue on which some religion claims expertise.

Avoidance of any reference to the subject of human origins is, indeed, a decidedly totalitarian approach to the problem presented here. Book-burning is always

dangerous, but never more dangerous than when practiced on behalf of young and impressionable minds. How is the teacher to respond to the inquiry of a high school biology student regarding the theory of evolution? Is he to be told that the subject is taboo, that the teacher is not permitted to speak of it, that he mustn't ask such questions?

Plaintiffs, however, would propose another approach that, at first glance, seems reasonable and fair: "equal time" for all theories regarding human origins.[6] If the beliefs of fundamentalism were the sole alternative to the Darwinian theory, such a remedy might at least be feasible. But virtually every religion known to man holds its own peculiar view of human origins. Within the scientific community itself, there is much debate over the details of the theory of evolution. This Court is hardly qualified to select from among the available theories those which merit attention in a public school biology class. Nor have Plaintiffs suggested to the Court what standards might be applied in making such a selection.

Plaintiffs' case must ultimately fail, then because the proposed solutions are more onerous than the problem they purport to alleviate. For this Court to require the District to keep silent on the subject of evolution is to do that which the Supreme Court has declared the Arkansas legislature is powerless to do. To insist upon the presentation of all theories of human origins is, on the other hand, to prescribe a remedy that is impractical, unworkable and ineffective.

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6. If this approach were applied in other areas, teachers might be obliged to provide equal time for an exposition of the Mormon belief in the inequality of the races, and for indoctrination in the Christian Science view of health and disease.

The State Board of Education, as one of the Defendants in this action, has suggested that Plaintiffs may be assisted by taking advantage of the provisions of § 21.104 of the Texas Education Code, which permits any child to be exempted, without penalty, from receiving instruction in certain areas of physiology and hygiene, upon the presentation of a signed statement from his parent or gaurdian that—the material conflicts with the family's religious beliefs.[7] Defendants maintain that §21.104 is broad enough to encompass Plaintiffs' objections to the teaching of the theory of evolution.

Plaintiffs assert, however, that reliance on §21.104 is misplaced, because the requirement of a signed statement compels a student "to profess a belief" in a religion, contrary to the Supreme Court's decision in *Torasco v. Watkind*, 367 U.S. 488 (1961). *Torasco*, however, dealt with a provision of the Maryland Constitution which required declaration of a belief in the existence of God as a qualification for holding public office. The State contended that the Maryland Court of Appeals, in upholding the qualification, had been acting on the authority of *Zorach v. Clauson*, 343 U.S. 306 (1951), *Zorach* had upheld the validity of a New York City "released time" program which permitted interested students to attend religious

7. §21.104 reads as follows:
"All textbooks on physiology and hygiene purchased in the future for use in the public schools of this State shall include at least one chapter on the effects of alcohol and narcotics. Although physiology and hygiene must be taught in all public schools, any child may be exempted, without penalty, from receiving instruction therein if his parent or guardian presents to the school principal a signed statement that the teaching of disease, its symptoms, development and treatment, and the viewing of pictures or motion pictures on such subjects conflict with the religious teachings of a well-established church or denomination to which the parent or guardian and the child belong."

courses operated outside the school building by various religious groups, with all other students remaining in the classroom. The Supreme Court in *Torasco* took care to distinguish *Zorach* and to express the view that, to whatever extent that case had breached the wall separating church and state, it had not

> "* * * open[ed] the way for government, state or federal, to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths * * *. *Torasco*, supra, at 493.

The Supreme Court, presented in *Torasco* with an opportunity to impose a narrowly restricted reading upon its decision in *Zorach*, declined to do so. And *Zorach*, thus affirmed, provides the answer to Plaintiffs' discomfort with the alternative of §21.104:

> "It takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the class rooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any." *Zorach*, supra, at 311.

Plaintiffs in the case at bar are attempting to have it both ways. On the one hand, they argue that they are forced to submit to teachings which deeply offend their religious beliefs. And yet they reject the option of leaving the classroom during the presentation of the offending material, contending that their exit under such circumstances is equivalent to the coerced expression of religious belief. For that matter, the mere filing of the present civil action puts Plaintiffs on record as holding

certain religious views. But the fundamental difference between the compulsion of a test oath and that of a "released time" program, or that underlying §21.104 is simply too great to ignore.

The Court thus finds that, under the facts pleaded, each of Plaintiffs' contentions regarding the teaching of the theory of evolution in the Houston public schools— that it inhibits Plaintiffs in the free exercise of their religion and that it constitutes an establishment of religion— fails to state a claim upon which relief can be granted. Although they have made no effort to develop the issue, Plaintiffs have also asserted that the teaching of the theory of evolution denies to them the equal protection of the laws, in contravention of the fourteenth amendment. Since Plaintiffs have failed to indicate the manner in which they have been denied the equal protection of the laws, the Court will merely note that Defendants' presentation of the theory of evolution seems to apply equally to all students. Thus, it appears that Plaintiffs' equal protection contention also fails to state a claim upon which relief can be granted.

Accordingly, Defendants' motion to dismiss for failure to state a claim is granted and this cause of action is hereby dismissed.

Clerk will file this Memorandum and Order and furnish all parties with true copies.

Done at Houston, Texas, this 3rd day of August, 1972.

WOODROW SEAL
United States District Judge

(SEAL)

APPENDIX B

IN THE
DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RITA WRIGHT, AND LEONA WEBER
AND BARBARA ANN DREW, AND
MRS. CANELLI DREW, Plaintiffs

v.

THE HOUSTON INDEPENLENT SCHOOL DISTRICT,
THE BOARD OF TRUSTEES OF THE HOUSTON
INDEPENDENT SCHOOL DISTRICT AND THE
PRESIDENT OF SAID BOARD OF TRUSTEES,
CENTRAL EDUCATION AGENCY, ET AL,
Defendants

CIVIL ACTION NO. 70-H-1236

INTERVENING PLAINTIFFS' MOTION FOR NEW TRIAL

To The Honorable Judge Of Said Court:

COMES NOW your Intervening Plaintiffs, John R. Brown, Sr., individually and as next friend of John R. Brown, Jr., and also as next friend of Carol Kay Kirkland, Nancy Kirkland, and Melissa Kirkland, and files this his Motion for New Trial in the above numbered and entitled cause and for his reasons would show unto the Court the following, to wit:

I.

The Court in its opinion on page 5 felt that we were trying to draw an analogy between this case at Bar and the Arkansas case. We submit to the Court that no analogy as such was made, but rather that in this fact situation in which the Arkansas law was struck down the Supreme Court enunciated the concept of neutrality interpreting the First Amendment. Your intervening Plaintiffs have stated that the manner in which the Central Education Agency and the Houston Independent School District practice the teaching of religion, i.e., evolution, violate the Doctrine of Neutrality.

In a deposition taken of Dr. J. W. Edgar, Texas Commissioner of Education of the State Board of Education by your Intervening Plaintiffs (which was not typed or filed in the Court at the time the Court dismissed this case), "Neutrality" was defined by Dr. J. W. Edgar as "neither this nor that." (P. 61-62) He further made the admission on page (101-107) that in fact neutrality was not being shown in the manner in which evolution is now being handled. On the basis of the admission of Dr. Edgar that neutrality is not being achieved, we respectfully request this Honorable Court for a new trial, especially in the light of the doctrine stated in Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266 (1968), where the Court said:

> "The First Amendment mandates government neutrality between religion and non-religion."

II.

This Honorable Court on page 5 of its opinion also stated:

> "Plaintiffs have not alleged that there exists even a school district policy regarding the theory of evolution."

Your Intervening Plaintiff would respectfully show unto this Court that he was in the process of gathering information from the Houston Independent School District which was promised to him upon several occasions that would show that a policy existed in fact. Your Intervening Plaintiff would allege to the Court that he was not given sufficient opportunity to develop information from these requested materials from the Houston Independent School District. However, we do plead now that there is a policy de facto if not in writing. Your Plaintiffs feel that they are entitled for sufficient time to discover said policy. We feel that policy can be shown by a long established practice, whether it be written or not. We have attempted to secure in our discovery, materials that will show this long established practice of both the Central Education Agency as well as the Houston Independent School District.

III.

Since this suit was brought under 42 U.S.C., Section 1983, we feel that we should be given the right to prove these fact situations. In your *Intervening Plaintiffs' Memorandum in Support of Intervening Plaintiffs' Answer to Defendant's Plea to the Jurisdiction and Motion for Dismissal for Failure to State a Claim Upon Which Relief can be Granted,* we quoted, "A case brought under 42 U.S.C., Section 1983 should not be dismissed at the pleading stage unless it appears to a certainty that the Plaintiff would be entitled to no relief under any state of the facts which could be proven in support of his claim." Scher vs.

Board of Education of Town of West Orange, 424 F.2d 741 (3rd Cir. 1970). We feel that the de facto policy your Intervening Plaintiff has alleged as well as the violation of neutrality and the subjection to ridicule which we equally allege should be considered as able to be proven under 42 U.S.C., Section 1983. These facts considered as proven would state cause upon which a claim could be granted.

IV.

Further, the Court in its opinion on page 6 stated the following:

> "Neither have Plaintiffs alleged that Defendants attempt to discourage the free discussion of the subject of human origins. There has been no suggestion that Plaintiffs, or any other students, have been denied the opportunity to challenge their teachers' presentation of the Darwinian theory. . . . Plaintiffs have failed even to assert the suppression of opposing ideas."

Your Intervening Plaintiffs would respectfully submit to the Court that in your *Intervening Plaintiffs' First Amended* Original Petition, Roman numeral V, Item 6 and 7:

> "6. That the above said total method of teaching subjects the student or students to actual and/or possible ridicule if said alternatives and the evidence supporting said alternatives are advanced by said students or if the alternatives being set forth by the Houston Independent School District are not accepted by him."
>
> "7. That dissent if brought, whether in question or in opposition, is passed by with no appreciable notice."

We submit to this Court that items 6 and 7 fulfill the qualifications of pleading as required by the Court on its page 6 of the Opinion. Under 42 U.S.C., Section 1983, in Miller v. Parson, 313 F. Supp. 1150 (M.D. Pa. 1970), the Court cited 2A Moore, Federal Practice, Sec. 12.08 (2d ed. 1968).

> "The Court on *Motion to Dismiss for Failure to State a Claim on Which Relief May Be Granted* construes all well-plead material allegations in the complaint as being true and admitted for purposes of the Motion unless clearly unwarranted. Only when it appears to a certainty that no basis for relief is present under the stated facts to support claim may the Court dismiss due to insufficiency of the claim."

Neutrality being violated can be proven and your Intervening Plaintiffs should have the opportunity to so do.

We feel that our statements that the students are subjected to ridicule and that dissent is being passed with no appreciable notice should be construed as true for the purpose of allowing the trial to continue for proof to be developed.

V.

The Court in its Opinion stated that the avoidance of any reference to the subject of human origin is, indeed, decidedly totalitarian approach to the problem presented here. We submit to the Court that the avoidance of presenting the alternative with its supporting scientific evidence is equally as totalitarian and as such this type of book burning has had serious consequences (which we would like to demonstrate) as it has been practiced on behalf of the young impressionable minds leaving

them to believe that there is no scientific evidence for the Creation alternative, but that all scientific evidence belongs in the Darwinian theory category—which is decidedly not so.

Perhaps, then, in the light of these two unwelcome horns to the same dilemma that the alternatives of presenting them both either as electives, preferably, or as mandatory requirements as is done elsewhere may be a solution the Court might explore. But we feel that—regardless of what solution the Court chooses—at this point, we should be allowed to present the evidence as it exists.

VI.

The Court in its examination of your Intervening Plaintiffs alternative proposal of equal time is rejected on the basis that there are many different views of human origins. As far as detail goes, this may be so; however, your Intervening Plaintiff was speaking concerning the major thought alternatives that had scientific supporting evidence. The alternative view of Creation has such scientific evidence, but we are not allowed by the Court to present it.

On page 9 this Court stated that "Plaintiffs case must ultimately fail, then, because the proposed solutions are more onerous than the problem they proport to alleviate." But this solution we would submit to the Court is neither onerous nor unworkable because the major thoughts with their supporting evidence could be presented to the children. In fact, it is the understanding of your Intervening Plaintiffs that two of the major thought structures (which are both the Darwinian theory and the alternative belief of Creation) are now in the process of being presented

in certain areas of the State of California. Your Intervening Plaintiffs would request the opportunity to bring evidence to show how that it is, in fact, practical, workable, and effective as it is now being practiced. Your Intervening Plaintiffs would state to the Court that this is new evidence in the sense that we have not been allowed to present said evidence concerning the practice in the State of California.

VII.

The Court in its Opinion on page 9 stated that the State Board of Education suggested the alternative provision of exemption under Section 21.104 of the Texas Education Code as an alternative solution. Your intervening Plaintiffs would submit to the Court that another piece of evidence not considered by the Court is in the above mentioned deposition of Dr. J. W. Edgar that was not typed or filed with the Court when the opinion of the Court was given. In said deposition on pages 160-161 Dr. J. W. Edgar made the statement that the elective method which your Intervening Plaintiffs have submitted as a workable alternative is in fact more "practical" and with less problems than the method of emeption that they had formerly espoused and to which the Court refers to in its Opinion. Again on page 160 of said deposition the question was put to Dr. Edgar:

> "Well, Doctor, don't you think it would be fairer, rather than to simply exempt the child, whenever evolution is taught to do it this way: Teach evolution and make critical analysis; examine it, it's good and bad points, and then, teach Creation, examine its good and bad points, and, having examined both fairly and neutrally, both the good and the bad,

fairly and neutrally, then everybody could be present and nobody subject to snickers."

Now, isn't this a more fair and an equitable policy?"

and Dr. Edgar gave the following answer:

"Well, it would constitute a fair and equitable policy."

VIII.

Your Intervening Plaintiffs' position concerning the exemption method by the Court on page 10 is simply that such an election or exemption would subject the child to ridicule as contained in Roman Numeral V, Item 6, of the *Intervening Plaintiffs First Amended Original Petition.* We do object to the option of leaving the classroom during the presentation of the offending material because it subjects those who do leave to ridicule, in the same way as those who object to the prayer in class, should they leave, would be subjected to ridicule. The U. S. Supreme Court has upheld this point.

IX.

We strongly urge upon the Court that the Federal right of neutrality under the First Amendment is being violated. We further urge that the function of the Federal Courts is to protect these basic fundamental rights. We do not feel that the right is protected until such time as we have been able to fully and completely develop the facts as they exist both here and elsewhere so that the Court may render a verdict in the light of all facts produced by the adversary circumstances. If we cannot have these rights protected in the Federal Court, to what other equitable jurisdiction can we appeal? Based upon the material presented in these above nine points we respectfully urge and request the Court to grant our Motion for New Trial.

X.

The Intervening Plaintiffs move the Court to set aside the verdict herein and to grant a new trial on the ground of evidence secured in the deposition of Dr. J. W. Edgar of the State Board of Education that was taken but not typed or filed with the Court before the opinion herein was rendered. Said evidence is material as mentioned in the above points of this Motion for New Trial and not merely cumulative or impeaching in character and is of such a nature that if received by the Court at the trial it would probably produce a different Judgment.

WHEREFORE, PREMISES CONSIDERED, your Intervening Plaintiffs would pray that the Order of the Court dismissing this case be set aside and that a new trial be granted so that the proof of the issues may be presented before the Court.

Respectfully submitted,

Herbert L. Coffman
Attorney for Intervening Plaintiffs
5757 Bellaire Blvd., Suite 203
Houston, Texas 77036
666-2256

THE STATE OF TEXAS §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day came the person known to me personally to be HERBERT L. COFFMAN, and being by me personally duly sworn, on oath says:

"My name is Herbert L. Coffman and I am the Attorney for the Intervening Plaintiffs, Dr. John R. Brown, Sr., et al, in the above entitled action that appeared before the Honorable Judge Woodrow Seals in the United States District Court for the Southern District of Texas, Houston Division. This action was for Judgment for Injunction against the Houston Independent School District. The Judgment dismissing the action was rendered before a deposition was typed, filed, and considered by the Court. We feel this new evidence consists of certain statements by Dr. J. W. Edgar, Texas Commissioner of Education of the State Board of Education. Said new evidence in the belief of your Intervening Plaintiffs is not cumulative or impeaching and is so material that if admitted as proof in trial of this action it would probably produce a different decision of the Court."

Herbert L. Coffman

SWORN TO AND SUBSCRIBED BEFORE ME, on this the ____ day of August, 1972, by the said Herbert L. Coffman.

Notary Public in and for
Harris County, Texas

PROOF OF SERVICE (Omitted)

APPENDIX C

UNITED STATES DISTRICT COURT
Southern District of Texas
Office of the Clerk
September 8, 1972

V. Bailey Thomas
Clerk

Mr. Herbert L Coffman
5757 Bellaire Blvd, Suite 203
Houston, Tx 77036

Mr. William Wilde
Mr. Kelly Frels
1808 First City Natl Bank Bldg
Houston, Tx 77002

Mr. James C McCoy
Asst. Attorney General
Box 12548, Capitol Station
Austin, Tx 78711

Mr. James S Kelly
Suite 501, 609 Fannin St
Houston, Tx

Mrs. Leona Weber
Solic Rock Refuge
Box 9339
Houston, Tx 77011

Re: RITA WRIGHT, et al vs. HOUSTON INDEPENDENT SCHOOL DISTRICT, et al
CA 70 H 1236

Dear Madam and Sirs:

By order of Judge Woodrow Seals, the following notation has been made to the docket in the above styled case:

"Motions by Plaintiff Barbara Ann Drew and by Intervening Plaintiff to reconsider, and to set aside the Order of the Court of August 3, 1972, dismissing this case, and to grant a new trial are denied and overruled. This is a final judgment. WS"

Very truly yours,

V. BAILEY THOMAS, Clerk
U. S. District Court

L. BAKER
Deputy

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3463

RITA WRIGHT, ET AL.,
Plaintiffs,

LEONA WEBER, Acting as Next Friend for
RITA WRIGHT, a Minor,
Plaintiff-Appellant,

JOHN R. BROWN, SR.,
Individually, Etc., ET AL.,
Intervenors-Appellants,

versus

THE HOUSTON INDEPENDENT
SCHOOL DISTRICT, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court
For the Southern District of Texas

(October 10, 1973)

Before GOLDBERG, CLARK and RONEY,
Circuit Judges.

PER CURIAM: In this 42 U.S.C.A. § 1983 case, plaintiffs seek to enjoin the Houston Independent School District and the Texas State Board of Education from teaching the theory of evolution, without teaching the other theories regarding human origin. Plaintiffs con-

tend that including the study of evolution in the school's curriculum constitutes the establishment of a sectarian, atheistic religion and inhibits the free exercise of their own religion in violation of the First Amendment to the Constitution of the United States. The District Court, after a hearing on defendants' motion under Rule 12(b)(6), F.R. Civ. P., dismissed the case.

After extended oral argument and a thorough and careful review of the record and briefs in this case, which include voluminous materials on the subject at hand, we conclude that the case should be affirmed on the comprehensive opinion of District Judge Woodrow Seals. *Wright v. Houston Independent School District*, ___ F. Supp. ___ (S.D. Tex. 1972).

Contrary to the sincere, able, and vigorous arguments of plaintiffs, the Federal courts cannot by judicial decree do that which the Supreme Court has declared the state legislatures powerless to do, *i.e.*, prevent teaching the theory of evolution in public school for religious reasons. *Epperson v. Arkansas*, 393 U.S. 97 (1968). To require the teaching of every theory of human origin, as alternatively suggested by plaintiffs, would be an unwarranted intrusion into the authority of public school systems to control the academic curriculum. *See Epperson v. Arkansas, supra; Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Shanley v. Northeast Independent School District, Bexar County, Texas*, 462 F.2d 960 (5th Cir. 1972).

We find no error in the District Court's denying plaintiff Weber's motion for relief from judgment pursuant to Rule 60(b)(1), F.R. Civ. P.

AFFIRMED.

APPENDIX E

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3463

RITA WRIGHT, ET AL.,
Plaintiffs,
LEONA WEBER, Acting as Next Friend for
RITA WRIGHT, a Minor,
Plaintiff-Appellant,
JOHN R. BROWN, SR.,
Individually, Etc., ET AL.,
Intervenors-Appellants,
versus
THE HOUSTON INDEPENDENT
SCHOOL DISTRICT, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Oct. 10, 1973, 5 Cir., 1973, ____ F.2d ____).

November 30, 1973)

Before GOLDBERG, CLARK and RONEY, Circuit Judges.

PER CURIAM: The Petition for Rehearing filed on

behalf of John R. Brown, Sr., is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX F

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 72-3463

RITA WRIGHT, ET AL, Plaintiffs,

LEONA WEBER, Acting as Next Friend for RITA WRIGHT, a Minor, Plaintiff-Appellant, JOHN R. BROWN, SR., Individually, Etc., ET AL., Intervenors-Appellants,

versus

THE HOUSTON INDEPENDENT SCHOOL DISTRICT, ET AL., Defendant-Appellees.

Appeals from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING

(November 30, 1973)

Before GOLDBERG, CLARK and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Plaintiff-Appellant, Leona Weber, etc. in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX G

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 72-3463

RITA WRIGHT, ET AL, Plaintiffs,

LEONA WEBER, Acting as Next Friend for
RITA WRIGHT, a Minor, Plaintiff-Appellant,
JOHN R. BROWN, SR.,
Individually, Etc., ET AL, Intervenors-Appellants
versus
THE HOUSTON INDEPENDENT
SCHOOL DISTRICT, ET AL,
Defendants-Appellees.

(Filed December 17, 1973)

Appeal from the United States District Court for the Southern District of Texas

Before GOLDBERG, CLARK and RONEY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the Court's order of November 30, 1973, denying the petition for rehearing of plaintiff-appellant, Leona Weber, is hereby vacated and set aside, pending the Court's consideration of a petition for rehearing en banc.

APPENDIX H

United States Court of Appeals
Fifth Circuit

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130

February 13, 1974

TO ALL COUNSEL OF RECORD

Re: No. 72-3463 - Wright, et al, Weber, Brown, et al
v. The Houston Independent
District, et al

Gentlemen:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing,* and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.
See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
Edward W. Wadsworth,
Clerk

By: Susan Le Brun
Deputy Clerk

*on behalf of Leona Weber, etc.

cc: Mr. Herbert L. Coffman
Ms. Leona Weber
Mr. James S. Kelly
Messrs. William Key Wilde
Kelly Frels
Messrs. John L. Hill
James C. McCoy
Bruce Youngblood

P.S. Also see order attached.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3463

RITA WRIGHT, ET AL,

Plaintiffs,

LEONA WEBER, Acting as Next Friend for RITA WRIGHT, a Minor,

Plaintiff-Appellant,

JOHN R. BROWN, SR., Individually, Etc., ET AL,

Intervenors-Appellants,

versus

THE HOUSTON INDEPENDENT SCHOOL DISTRICT, ET AL,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

---

(Filed February 13, 1974)

Before GOLDBERG, CLARK and RONEY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellant, John R. Brown, Sr., M.D., to vacate the Court's order of November 30, 1973, and grant his petition for rehearing

en banc in conjunction with the petition for rehearing en banc now pending on behalf of plaintiff-appellant, Leona Weber, is hereby denied.

IT IS FURTHER ORDERED that his request that the Court vacate its order of November 30, 1973, denying his petition for rehearing and rehearing en banc, and to re-enter the order to correspond with the order to be entered on behalf of plaintiff-appellant, Leona Weber, is hereby granted.

APPENDIX I

UNITED STATES STATUTES

28 U.S.C. § 1254

§ 1254. *Courts of appeals; certiorari; appeal; certified questions*

* * *

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 1343

§ 1343. *Civil rights and elective franchise*

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

42 U.S.C. § 1983

§ 1983. *Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or useage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

AMENDMENTS TO CONSTITUTION OF THE UNITED STATES

Amendment I

Congress shall make no low respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech * * *

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

Rule 12(b)(6)

* * *

(6) failure to state a claim upon which relief can be granted, * * *

FILE COPY

MAY 23

MICHAEL ROD

IN THE

Supreme Court of the United States

October Term 1973

NO. 73-1620

JOHN R. BROWN, SR., M.D.,
Petitioner

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT ET AL, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

WILLIAM KEY WILDE
L. KELLY FRELS
BRACEWELL & PATTERSON
1808 First City National Bank Building
Houston, Texas 77002
Counsel for Respondents

May 20, 1974

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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IN THE

Supreme Court of the United States

October Term 1973

NO. 73-1620

JOHN R. BROWN, SR., M.D.,
Petitioner

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT
ET AL, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Fifth Circuit

---

BRIEF OF RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the District Court (Petitioner's Appendix A) is not officially reported. The opinion of the Court of Appeals for the Fifth Circuit (Petitioner's Appendix D) is reported at 486 F.2d 137.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Whether Petitioner failed to state a claim upon which relief can be granted.

Statement

The original Plaintiffs sought to enjoin the Houston Independent School District (District) and the State Board of Education from teaching the theory of evolution as a part of the District's academic curriculum and from adopting textbooks which present the theory without critical analysis and to the exclusion of other theories regarding the origins of man. Subsequently, Petitioner was permitted to intervene. The District Court, after notice and hearing, granted the District's Motion to Dismiss for Failure to State a Claim upon Which Relief Can be Granted made pursuant to Fed. R. Civ. P. 12(b)(6). The Court of Appeals for the Fifth Circuit in a Per Curiam Opinion affirmed the Opinion of the District Court.

Argument

There are no special or important reasons for a review on Writ of Certiorari. The decision of the Court of Appeals is not in conflict with a decision of any other court of appeals nor with applicable decisions of this Court. Further, no important question of federal law has been raised. Petitioner merely complains because the courts below held that he had failed to state a claim on which relief can be granted, citing the holdings of this Court,

which set forth the circumstances under which a dismissal pursuant to Rule 12(b)(6) is proper, *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 21 L.Ed.2d 80 (1957), *Jenkins v. McKeithen*, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). The courts below properly applied the *Conley* and *Jenkins* tests to the relief sought. It appears beyond doubt that Petitioner can prove no set of facts in support of his claim which would entitle him to relief even when the material allegations of the Complaint are taken as admitted.

The original Plaintiffs sought the following relief in the District Court:

> "WHEREFORE, Plaintiffs pray for an injunction permanently enjoining Defendants, Houston Independent School District and all other Defendants, from continuing to teach the theory of evolution in any manner in any of the schools of said public school system and from selecting, supplying and using text books that present the theory without a concomitant critical analysis and to the exclusion of other theories, such as the creation theory, regarding the origin of man, and from selecting, supplying and using books to teach the evolutionary theory without a concomitant critical analysis and to the exclusion of other theories regarding the origin of man." Plaintiffs' Second Amended Application for Permanent Injunction (R. 372-378)

Subsequently, Petitioner intervened and adopted Plaintiffs' Second Amended Application for Permanent Injunction. In addition, Petitioner sought the following relief:

> "WHEREFORE, premises considered, Intervening Plaintiffs pray for an injunction permanently enjoining the Defendant Houston Independent School Dis-

> trict and all other Defendants from continuing to teach the theory of evolution in any manner of teaching, discussing, supplying and using textbooks in any manner that presents the theory of evolution in the manner specifically pled in paragraph V, Points 1 through 9, and therefore would pray for such remedies of the court that neither violate the First Amendment Doctrine of Neutrality and the Fourteenth Amendment in theory nor has the practical effect of violating the theory of neutrality, or in the alternative should the theory of evolution be taught, that the Court place such safeguards upon the teaching that it is taught with a critical analysis and that the other scientific alternatives and evidences be taught also." (R. 69-74)

Thus, the very relief sought by Petitioner, if granted, would be violative of the Constitution of the United States. *Epperson v. Arkansas,* 393 U.S. 97, 89 S.Ct. 266 (1968). There, this Court struck down a statute which prohibited the teaching of evolution in the Arkansas public schools. Just as this Court held that the anti-evolution law is contrary to the mandate of the First and in violation of the Fourteenth Amendment to the Constitution, so would be the result if the relief sought by Petitioner were granted. As held by the Court of Appeals below, federal courts cannot by judicial decree do that which the Supreme Court has declared the state legislatures powerless to do, i.e., prevent teaching of the theory of evolution in public schools for religious reasons. *Wright v. Houston Independent School District,* 486 F.2d 137, 138.

In *Epperson* this Court held that the state's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or

doctrine where the prohibition is based upon reasons that violate the First Amendment. Surely, in prescribing the curriculum for its public schools, a state should not be prohibited by judicial decree from the teaching of a scientific theory where the prohibition would violate the First Amendment.

Since *Epperson v. Arkansas, supra,* this Court has had an opportunity to consider two cases involving public school curriculum and the First Amendment. *Brusca v. State of Missouri,* 332 F. Supp. 275 (E.D. Mo. Three Judge Court, 1971), aff'd. 405 U.S. 1050, 92 S.Ct. 1493 (1972), and *Cornwell v. State Board of Education,* 314 F. Supp. 340 (D. Md. 1969), aff'd. 428 F.2d 471 (4th Cir.) cert. denied 400 U.S. 942, 91 S.Ct. 240 (1970). Both were dismissed for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6).

The plaintiffs in *Cornwell* sought to enjoin the operation of a comprehensive program of family life and sex education conducted in the Baltimore county schools. They urged that the sex education program denied them the free exercise of their religious concepts, and that the teaching of sex in the educational context establishes religious concepts in violation of the First Amendment. The District Court determined there was no substantial constitutional claim, holding:

> "Applying these principles that have been established by these various cases is quite clear to this Court that the purpose and primary effect of the by-law here is not to establish any particular religious dogma or precept in that the by-law does not directly or substantially involve the state in religious exercises or in the favoring of religion or any particular religion." 314 F. Supp. 340, 344.

In affirming, the Court of Appeals for the First Circuit considered the dismissal of the action for failure to state a claim upon which relief can be granted:

> "The District Court in construing the allegations in the light most favorable to the plaintiffs held that the constitutional challenge lacks merit. We agree and for the reasons stated by the District Court we affirm its dismissal of the action." 428 F.2d 471, 472.

In *Brusca v. State of Missouri, supra,* a three judge panel dismissed an action by taxpayers asserting the invalidity of the Missouri Constitution and statutes which establish and provide for the funding of a free public school system and which prohibit the use of public funds to directly or indirectly aid religious or sectarian schools. There the court found:

> "It is crystal clear from the amended complaint (and from plaintiff's briefs in opposition to the motion to dismiss) that the 'precise' reason parent-plaintiffs demand state aid in this case is to enable them to obtain a religious education for their children."

In the case *sub judice,* Petitioner seeks to obtain a religious education for his children in the schools of the District. The panel cited this Court's decision in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105 (1971), as the most recent pronouncement and one which forecloses any possibility of granting the relief sought by Plaintiffs. The Court applied the *Lemon* tests and held that "In the present case, in which Plaintiffs demand, as a matter of right, state aid for the very purpose of enabling them to give children an adequate religious education in sectarian schools, any plan to achieve that end would necessarily have a non-secular legislative purpose and thus fail

to meet the first test." For the same reasons, the relief sought by Petitioner herein fails to pass the *Lemon* test. Indeed, it fails on all three criteria: First, that it have a secular legislative purpose; second, that its principal or primary effect be one that neither advances nor inhibits religion; third, it must not foster "an excessive government entanglement with religion." *Lemon v. Kurtzman,* 91 S.Ct. 2105, 2111.

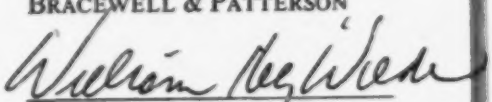
As in *Cornwell v. State Board of Education, supra,* and *Brusca v. State of Missouri, supra,* any possibility of granting the relief sought by Petitioner has been foreclosed. The relief sought is proscribed by the Constitution of the United States. Petitioner's complaints do not state a claim upon which relief can be granted and were properly dismissed.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BRACEWELL & PATTERSON



WILLIAM KEY WILDE
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May 20, 1974

CERTIFICATE OF SERVICE

Three true and correct copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari have been served on Herbert L. Coffman, attorney for Petitioner John R. Brown, Sr., M.D., by mailing copies of same by United States mail with sufficient postage thereon to Herbert L. Coffman, 5757 Bellaire Blvd., Suite 203, Houston, Texas 77036, and on the State Board of Education and the Central Education Agency by mailing copies of same by United States mail with sufficient postage thereon to Bruce Youngblood, Assistant Attorney General of Texas, Box 12540, Capitol Station, Austin, Texas.

William Key Wilde

WILLIAM KEY WILDE

FILE COPY

MAY 29 19

MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1973

NO. 73-1620

JOHN R. BROWN, SR., M.D., *Petitioner*

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT
ET AL, *Respondents*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for
The Fifth Circuit

BRIEF IN OPPOSITION

OF RESPONDENTS
CENTRAL EDUCATION AGENCY
STATE COMMISSIONER OF EDUCATION
STATE BOARD OF EDUCATION

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May 27, 1974

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BRIEF IN OPPOSITION

OF RESPONDENTS
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STATE COMMISSIONER OF EDUCATION
STATE BOARD OF EDUCATION

OPINIONS BELOW

The opinion of the District Court (Petitioner's Appendix A) is reported at 366 F.Supp. 1208. The opinion

of the Court of Appeals for the Fifth Circuit (Petitioner's Appendix D) is reported at 486 F.2d 137.

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether in a First Amendment context petitioner's pleadings, concluding that "evolution" is a religious theory, present a claim upon which relief can be granted.

STATEMENT

The original Plaintiffs sought to enjoin the Houston Independent School District and the State Board of Education from teaching the "theory of evolution" as a part of the District's academic curriculum and from adopting textbooks which present the theory to the exclusion of the "creation theory" regarding the origins of man. Subsequently, Petitioner was permitted to intervene. The District Court, after notice and hearing, granted the District's Motion to Dismiss for Failure to State a Claim upon Which Relief Can be Granted made pursuant to Fed. R. Civ. P. 12(b)(6). The Court of Appeals for the Fifth Circuit in a Per Curiam Opinion affirmed the Opinion of the District Court.

STATUTORY PROVISIONS

Relevant provisions of Sections 12.11-12.16, 12.24, 12.62 of Vernon's Texas Education Code are reproduced in the Appendix at page 19.

ARGUMENT

The State of Texas is neutral with respect to competing religious or spiritual concepts, and it does not prefer non-religion over religion, religion over non-religion, or any particular religion over a different one. In that respect, this brief is neutral also. It does not assume that "creation" is wrong and "evolution" is right — or vice versa. It merely seeks to posit the law as it applies to the particular situation presented for decision, i.e., one where the State Board of Education has determined that the origin of man is a legitimate subject of secular inquiry and that the theory of evolution, as it respects the origin of the species, is a useful scientific hypothesis which should not be excluded from school textbooks.

There are no special reasons for a review by the Supreme Court, and the results reached by the Courts below were correct. The State of Texas need not tailor its curricula or textbooks to avoid subjects of study because they are controversial in the eyes of some.

Though Petitioner couches his arguments in terms of the Establishment Clause and the Free Exercise Clause

of the First Amendment to the U.S. Constitution, his real complaint is one of "arbitrary classification." The focal points of his arguments are: (1) the origin of man is not really a scientific subject, but rather a religious one; and (2) though the subject ought not to be taught at all in the schools, if it is taught, competing religious explanations for man's origin should be given "equal time" in the classroom.

Petitioner's argument rests upon the supposition that "the theory of evolution" is a basic tenet of atheistic theological thought, and that, though it may have been originally dubbed "scientific," it has been so widely adopted by non-believers as to become inseparable from such non-belief. [See *Jackson v. California,* 460 F.2d 282, 283, note 1 (9th Cir. 1972), where similar claims were unsuccessfully urged.]

The lower Court was asked to declare, in effect, that the theological adaptation of a scientific proposal *ipso facto* disqualifies the proposal as a scientific one. Cf. *McGowan v. Maryland,* 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961); *Cornwell v. State Board of Education,* 314 F.Supp. 340 (D.Md. 1969), aff'd, 428 F.2d 471 (4th Cir. 1970), cert. denied, 400 U.S. 924, 27 L.Ed.2d 246, 91 S.Ct. 240 (1970); *Brusca v. Missouri,* 332 F.Supp. 275 (E.D.Mo. 1971), aff'd, 405 U.S. 1050, 31 L.Ed.2d 786, 92 S.Ct. 1493 (1972).

State laws regulating the education of the young, promulgating a curriculum, and providing text books

are exercises of the police power. *Barbier v. Connolly,* 113 U.S. 27, 28 L.Ed. 923, 5 S.Ct. 357 (1884); *Interstate Consolidated Street Railway Co. v. Massachusetts,* 207 U.S. 79, 52 L.Ed. 111, 28 S.Ct. 26 (1907); *Borden v. Louisiana State Board of Education,* 168 La. 1005, 123 So. 655, 661 (1929), 67 A.L.R. 1183, 1192; 16 Am.Jur.2d, Constitutional Law §306, p. 600.

One of the rights protected by the Fourteenth Amendment is the right of the individual "to acquire useful knowledge" and the state cannot interfere with that right by arbitrary action, even though the interference be in the guise of protecting the public interest. A state may not arbitrarily forbid the teaching of any subject. *Meyer v. Nebraska,* 262 U.S. 390, 67 L.Ed. 1042, 43 S.Ct. 625 (1923). The Petitioner seeks to enjoin the teaching of the theory of evolution to anyone in public schools because it conflicts with his religious belief and, he says, constitutes a tenet of another (anti) religion. He says the state, in order to maintain neutrality, must either stop teaching evolution as a viable explanation for the origin of the species, or accord his alternative explanation an equal position in the curriculum.

The Establishment Clause, however, does not ban federal or state regulation, the reason or effect of which happens to coincide or harmonize with the tenets of some or all religions. *McGowan v. Maryland,* 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961). If the purpose of teaching evolution is secular and if the primary effect

thereof is to neither advance nor hinder religion, and if it does not foster church/state entanglements, it is wholly immaterial that the concept is more compatible with some other religious view than with that held by the Petitioner. Cf. *Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct. 2105 (1971); *Tilton v. Richardson*, 403 U.S. 672, 29 L.Ed.2d 790, 91 S.Ct. 2091 (1971); *Abington School District v. Schempp*, 374 U.S. 203, 10 L.Ed.2d 844, 83 S.Ct. 1560 (1963).

The neutrality required by the First Amendment does not require the state to refuse to its citizens the right to acquire useful knowledge, nor to surrender to religious or anti-religious advocates the power to determine for others whether some purported body of knowledge is useful or not useful. As said in *Epperson v. Arkansas*, 393 U.S. 97, 21 L.Ed.2d 228, 89 S.Ct. 266 (1968), where the Arkansas anti-evolution law was under consideration:

> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. 393 U.S. at 104
>
> * * * *
>
> There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma. 393 U.S. at 106

In *Epperson v. Arkansas,* Justice Fortas referred to the theory of evolution as "a scientific theory or doctrine," observing that the state's "undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment." 393 U.S. at 107. The opinion had already noticed that the state has no legitimate interest in protecting any or all religions from views that are distasteful to them.

Whenever the Courts have intervened in school textbook and curricula affairs, it has been to eliminate restrictions upon the free advance of knowledge — not to force the inclusion of any particular theory as "better" or "right", or even "equal".

The Petitioner here is no more entitled to have the Courts force into the textbooks the "instantaneous creation" theory, (even if considered a purely secular hypothesis) than would other parents be entitled to insist that "old math" be taught right alongside the baffling (to a student from a former era) "new math" now being taught in most schools. "Old math" may be more sound in principle and logic than "new math", but so long as the state does not repress any particular theory or body of knowledge, its school authorities are (and must be) free to select those secular subjects for study which advancement of the learning process suggests to them.

While unwanted exposure of the Petitioner to unshared views, if coerced, might amount to a violation of the Free Exercise Clause under some circumstances, the remedy is exemption. *Wisconsin v. Yoder,* 406 U.S. 205, 32 L.Ed.2d 15, 92 S.Ct. 1526 (1972). The Petitioner here has not pleaded any refusal by school authorities to accord his children exempt status — and indeed, he does not want it. He neither asked for an exemption nor pleaded facts (as opposed to possibilities) demonstrating the effect of the school curriculum on their religious beliefs. He instead seeks to prevent the exposure of anyone in school to ideas regarding the origin of man unless his own concept about the matter is formally presented also. It is as though the Amish in *Yoder* had insisted that the school system in Wisconsin either include Amish attitudes in its teaching program, or shut the schools down.

The matter of classification confounds such arguments. If the "creation theory" is secular, then it must compete for a place in the curriculum on its own merits, unaided by any *positive* impetus from the First Amendment. The state's only obligation is to permit a free flow of ideas. If the "creation" theory is religious, and not secular, then it may not be foisted upon the public schools, whether or not it is accompanied by a second or different religious explanation, because the state cannot prefer one religion over another, or two religions over the rest.

Under no circumstances then, may the Petitioner lawfully succeed in *forcing* the schools to teach "creation". The only alternate relief he seeks is to outlaw all discussions in the schools regarding the origin of man, especially in an "evolution" context. To succeed, he must establish that explanations regarding the origin of man, and particularly the "evolution" explanation, involve purely religious matters and are not properly classified as legitimate secular fields of inquiry, i.e., that the State of Texas is arbitrary and capricious in considering them so.

If "evolution" *is* purely a religious viewpoint or doctrine, then neither the "creation" theory (assuming it is considered a religious doctrine also) nor the "evolution" theory could be taught, because the Establishment Clause would be contravened. But if the "religious" character of the "evolution" theory is not so clear as to show arbitrariness or caprice in classifying it otherwise, the Petitioner cannot win or secure any relief under any circumstances.

Point "eight" of Intervening Plaintiffs' First Amended Original Petition is the only portion of Petitioner's pleadings directed to the central question: "Is 'the theory of evolution' a religious doctrine?", and it merely states:

> That said theory of evolution is a central doctrine in atheistic philosophy, atheistic religious thought or form or forms of religion and as such has become itself a sectarian doctrine * * * [the State is] in the

> position of teaching such sectarian doctrine to the total exclusion of all other alternatives, *which said alternatives are classified by the state as sectarian doctrines.* R. 69, 71, 72 (Emphasis added)

On motions to dismiss, all well-pleaded facts are to be taken as true, but the truth of legal conclusions cast in the form of fact statements is not thereby admitted.

In *Pauling v. McElroy,* 278 F.2d 252 (D.C.Cir. 1960), cert. denied, 364 U.S. 835, 5 L.Ed.2d 60, 81 S.Ct. 61 (1960), a group of individuals sued to stop government nuclear testing. The District Court dismissed the suit for failure to state a claim involving a justiciable controversy and for lack of standing to sue. The Plaintiffs there alleged that nuclear tests "will cause world-wide fallout of radioactive debris * * * and will increase the radioactive strontium content of the soil and the amount of contamination of the food supply of the world and of the bones of human beings." They also alleged that radioactive debris would be "eventually deposited on the surface of the earth * * * [and thereby] contribute to the exposure of human beings to radiation."

The Court said:

> While the appellees' motions for dismissal admit, for purposes of the motion, all well pleaded facts in the complaints, such admission does not, of course, embrace sweeping legal conclusions cast in the form of factual allegations. 278 F.2d at 253.

The Court in *Pauling v. McElroy* went on to uphold the dismissal on "no standing" grounds. Its holding

regarding the effect of broad conclusory allegations was followed by *O'Hair v. Payne*, 432 F.2d 66 (5th Cir. 1970), cert. denied, 401 U.S. 955, 28 L.Ed.2d 238, 91 S.Ct. 974 (1971), in a First Amendment context. Mrs. O'Hair sought to enjoin NASA from authorizing astronauts to participate in religious activities during space flights. The Fifth Circuit Court of Appeals affirmed a lower court's dismissal of the case for failure to state a claim upon which relief could be granted.

And on April 15 of this year, it appears (from the report at 42 U.S. Law Week 3576) that the Supreme Court denied certiorari in No. 73-1191 on its docket (*Hourihan v. Dakin*), thereby leaving undisturbed a First Circuit Court of Appeals decision that allegations of religious discrimination consisting of "but the most conclusory of charges" are insufficient to state a cause of action upon which relief can be granted.

Except for "the most conclusory of charges" that the theory of evolution "is a central doctrine in * * * atheistic religious thought or form or forms of religion and as such has become itself a sectarian doctrine", the Petitioner does not make any allegations in his pleadings tending to show that the theory of evolution is in fact a religious doctrine rather than a secular one. The use of the phrase "has *become* * * * a sectarian doctrine" in the above statement seemingly admits that the thory of evolution as it respects the origin of man was not originally a sectarian matter, but the result of scientific inquiry.

It is not enough for the Petitioner to show that the "creation theory" might also be considered a secular explanation.

In administratively adopting textbooks classifying the theory of evolution as a secular (rather than sectarian) doctrine, the Texas State Board of Education acted under a power legally delegated to it by the Texas Legislature. Texas Education Code, §§12.11-12.16, 12.24, 12.62. When legislative action, within the scope of the police power, or administrative action pursuant to a legislative delegation of such power, is called into question, there is a presumption of the existence of a state of facts that would sustain it if any such state of facts can reasonably be conceived, *McGowan v. Maryland*, 366 U.S. 420, 6. L.Ed.2d 393, 81 S.Ct. 1101 (1961); *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 80 L.Ed. 138, 56 S.Ct. 159 (1935).

In *Pacific States Box & Basket Co. v. White, supra*, the maker of a certain kind of container sought to enjoin the State of Oregon from legally specifying that only a different kind of container was suitable for the storage of raspberries. The Plaintiff alleged the administrative action specifying the other type container, alone, to be suitable for use as a container for such berries (thereby excluding the Plaintiff's type) was arbitrary and capricious. The Plaintiff claimed that its type container was just as suitable as the other, and perhaps more so.

The claim which the Plaintiff made in that case is analogous to the one made here, in that the Petitioner here claims that his theory of the origin of man is just as valid and just as scientifically supportable as the theory of evolution, and that the state is incorrect in classifying the evolution theory as a scientific one, especially while denying that classification to the theory espoused by the Petitioner.

In *Pacific States Box & Basket Co.*, the Supreme Court affirmed a District Court's dismissal of the complaint for failure to state a claim upon which relief could be granted, saying:

> '[O]ne who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary' * * * The burden is not sustained by making allegations which are merely the general conclusions of law or fact * * * Facts relied upon to rebut the presumption of constitutionality must be specifically set forth * * * A motion to dismiss, like a demurrer, admits only facts well pleaded. 296 U.S. at 185.

The Petitioner here wholly failed to plead any facts tending to show that the State Board of Education classification of the theory of evolution as a scientific theory is so unreasonable and devoid of a temporal, rational basis as to be arbitrary and capricious. Moreover, he has wholly failed to plead facts showing that the alleged "sectarian" classification of his explanation of the

origin of man is arbitrary or capricious. Only broad and unsupported conclusions suggest any such claims. Such sweeping allegations cannot forestall a dismissal. As the Supreme Court noted in the *Pacific States Box & Basket Co.* case, the wisdom of the administrative action is not for the Courts to decide; they may inquire only whether it is arbitrary or capricious.

Because the Plaintiffs totally failed to plead any facts showing arbitrariness or caprice by the state and local school authorities in the classification of the theory of evolution as a secular subject of study, the District Court Judge was imminently right in dismissing the action for failure to state a claim upon which relief could be granted, and there is no reason to grant writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit which affirmed that decision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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First Assistant Attorney General

J. C. DAVIS
Assistant Attorney General

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Assistant Attorney General

Counsel for Respondents
Central Education Agency
State Commissioner of Education
State Board of Education

CERTIFICATE OF SERVICE

Three true and correct copies of the foregoing Brief in Opposition of Respondents Central Education Agency, State Commissioner of Education, and State Board of Education to Petition for Writ of Certiorari have been served on Herbert L. Coffman, attorney for Petitioner John R. Brown, Sr., M.D., by mailing copies of same by United States mail with sufficient postage thereon to Herbert L. Coffman, 5757 Bellaire Blvd., Suite 203, Houston, Texas 77036, and on the Houston Independent School District by mailing copies of same by United States mail with sufficient postage thereon to William Key Wilde, Bracewell & Patterson, 1808 First City National Bank Building, Houston, Texas 77002.

LARRY F. YORK

APPENDIX

APPENDIX

Vernon's Texas Education Code:

§12.11. State Textbook Committee

(a) The commissioner of education . . . shall recommend the names of 15 persons, no two of whom shall live in the same congressional district, for appointment to the textbook committee for a one-year term.

(b) Each of the persons so named shall be an experienced and active educator engaged in teaching in the public schools of Texas . . .

* * *

(e) It shall be the duty of the textbook committee to recommend to the commissioner of education a complete list of textbooks which it approves for adoption at the various grade levels and in the various school subjects . . .

* * *

§12.12. Recommendations by State Commissioner of Education

(a) The commissioner of education may remove books from the list recommended by the State Textbook

Committee, but shall not place on the list any book not recommended by the committee, nor shall he reduce to a single adoption any list for a specific grade or subject in which multiple adoption is recommended by the committee.

(b) The commissioner of education, pursuant to the provisions in Subsection (a) of this section, shall submit to the State Board of Education the list recommended by the State Textbook Committee.

§12.13. Adoption by State Board of Education

The State Board of Education may remove books from the list submitted by the commissioner of education, but the board shall not place on the list any book not recommended by the commissioner of education, nor shall the board reduce to a single adoption any list for a specific grade or subject in which multiple adoption is recommended by the commissioner of education.

§12.14. Multiple List for Elementary Grades

(a) The State Board of Education shall select and adopt a multiple list of textbooks for use in the elementary grades of the public schools of Texas.

(b) The multiple list shall consist of not less than three nor more than five textbooks on the following subjects: spelling, reading (basal and supplementary),

English language and grammar, geography, arithmetic, physiology-hygiene, civil government, driver education and safety, vocal music, elementary science, history of the United States (in which the Confederacy shall be fairly represented), history of Texas, agriculture, a system of writing books, and a system of drawing books.

(c) The board may also select and adopt textbooks for any additional subjects approved by the State Department of Education for teaching in the elementary schools, including but not limited to the foreign languages of German, Bohemian, Spanish, French, Latin, or Greek.

(d) The board may, if deemed necessary, adopt as textbooks a geography of Texas and a civil government of Texas.

(e) No book adopted shall contain anything of a partisan or sectarian character.

§12.15. Multiple List for High Schools

(a) The State Board of Education shall adopt a multiple list of books for use in the high schools of Texas.

(b) The multiple list shall include not fewer than three nor more than five textbooks on the following subjects: algebra, plane geometry, solid geometry, general science, biology, physics, chemistry, a one-year

world history, American history, homemaking, physical geography, driver education and safety, vocal music, English composition, literature (including American literature and English literature), shop courses, physiology, agriculture, civil government, commercial arithmetic, bookkeeping, typewriting, shorthand, journalism, and the Latin, Spanish, German, Czech and French languages.

(c) Free textbooks may also be adopted and provided for any additional courses or subjects approved by the Central Education Agency and accredited by the state accrediting committee.

§12.16. Other Provisions

* * * *

(c) Textbooks adopted in accordance with the provisions of this section are adoptions for every public school in this state and no public school in the state shall use any textbook unless it has previously been approved and adopted by the State Board of Education. The board shall prescribe rules under which such textbooks adopted and approved shall be introduced or used by or in the public schools of the state.

* * * *

§12.24. *Selection and Adoption*

(a) The State Board of Education shall make a full and complete investigation of all books and accompanying bids. The textbooks shall be selected and adopted after a careful examination and consideration of all books presented.

(b) The books selected and adopted shall be those which in the opinion of the board are most acceptable for use in the schools. Quality, mechanical construction, paper, print, price, authorship, literary merit, and other relevant matters shall be given such weight in making the decisions as the board may deem advisable.

* * * *

§12.62. *Local Adoptions*

(a) No public school in the state shall use any textbook unless it has been previously adopted and approved by the State Board of Education.

(b) In each subject of the elementary and high school grades, one or more of the several textbooks of each multiple list adopted may be selected by local school officials; . . .

* * * *

MAY 29 19
MICHAEL RODAK, JR.

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Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITIONER'S ~~APPELLANT'S~~ REPLY TO RESPONDENTS' ~~APPELLEES'~~ ANSWER

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APPELLANT'S REPLY TO APPELLEES' ANSWER

REPLY TO THE ANSWER OF THE STATE OF TEXAS TO THE APPELLANT'S PETITION FOR CERTIORARI

The State of Texas, as it did before the Court of Appeals, pleads its neutrality, and then becomes an active adversary. The Houston Independent School District is an adversary without feeling the necessity of pleading any neutrality.

The State misunderstands the thrust of our pleading and our argument. On Page 3,* it states that our argument "rests upon the supposition that 'the theory of evolution is a basic tenet of atheistic theological thought,' and that though it may have been originally dubbed 'scientific', it has been so widely adopted by non-believers as to become inseparable from such non-belief." Admittedly, this is one element, but to say that it "rests" upon it is to thoroughly misstate our position. The evolutionist has become evangelical. He has secured Federal grants to write a series of textbooks so that evolution is presented in such a manner that the student is wholly indoctrinated. These text books with the manner of the teacher's instruction, and the Supervisor's supervision, and the consistent practice of both the State of Texas and the Houston Independent School District to have only evolution taught coupled with the intellectual snobbery and ridicule attendant with its teaching serve to present evolution as a religious fact to receive the homage of its believers. The absolute totality of the situation causes the violation of both the Establishment and Free Exercise Clauses.

We do not care that it is controversial, nor have we said—as the State represents us to say,—"that the theological adaptation of a scientific proposal *ipso facto* disqualifies the proposal as a scientific one." We are further misrepresented by the State in saying on Page 4 that we seek to enjoin "because it conflicts with his religious belief." This part of our position, stated without the other part of our position, so misstates it, that it cannot be recognized. Evolution has become a religious doctrine and by the totality of the religious manner of its teaching, it violates the Establishment Clause, the Free Exercise of

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* Page reference follow the State's rough draft pagination.

our religion, and our Freedom of Speech. Once more, on Page 6, the State represents that we are objecting merely because certain views are "distasteful." Then, as the ultimate example of the State's total lack of the grasp of the thrust of our argument, is its comparison of our position with "old math" and "new math". Neither new math nor old math is a religious theory, taught as a religious theory, believed on as a religious theory, nor received up into the glory of certain academic circles as a religious theory. One does not go through either new or old math and come out with a religious philosophy of living! But the religious theory of evolution invades not only the sciences, but history, economics, social studies and philosophy as well. Before the State of Texas proclaims its neutrality, it should examine more closely its practice. If this be neutrality, then give me an adversary!

We further take strong exception to the statement on Page 7 which implies that our position would have said that the school system in Wisconsin include Amish attitudes in its teaching program, or shut the schools down. The State basically is charging us with its self-interpreted result of what we pray for. The school system could not give what the Amish asked for. Their remedy was withdrawal not exemption, and the state opposed it. The school system can give what we ask for, and what Mr. Justice Clark in *Schempp* said was acceptable—that is, *objectivity*. It is the language of *Schempp* that says exemption is unconstitutional. The only viable remedy is for the State, in fact, in addition to their assertions, to become neutral. The State refers to Plaintiff-Appellant's position as "his own concept" regarding the origin of man. This type of thinking is exactly the type the student presently has to cope with. Evolution is truth, and anything else is someone's "own concept." The State of Texas seems

to be totally unaware of how many scientists question evolution, how many more challenge it, and how many more disown it, and what excellent evidence opposes it. But the State says "Compete". The State's attitude is strongly reminiscent of the White man in the 1940's saying to the Black man in the South, "Compete". How can one compete when the system is structured against you? That is exactly what the Petition for Certiorari is all about. We want the system restructured to the extent that there is no Establishment of Religion—and so that in the free flow of ideas, there can be competition for the minds of the children.

The State says we cannot lawfully do it. Segregation may have been lawful under the existing structure, but this Court said it was unconstitutional.

On pages seven and eight, the State talks about classification as religious or secular. The State, seemingly, has never grasped that there is a third alternative. And that is what we have pled: The secular by being taught alone, and by the manner of its teaching by its devotees has become a religious doctrine Established, infringing on the Free Exercise of our religion, and the Freedom of our Speech.

The State talks about Facts and Conclusions in the same vein that it talks about religious and secular. It is "either-or" with the State, and no middle ground. Fact: The State is not neutral. Dr. J. W. Edgar of the State admitted it. This is also a conclusion. Fact: Dr. J. W. Edgar admitted that there is a "Consistent practice" in having only evolution in school books. This is also a conclusion. Fact: Dr. J. W. Edgar felt that teaching both was better than Exemption. The State's educator does not like

exemption, even though the State's Attorney does. One could also call this a conclusion. There was no opportunity to amend the Petition, nor any opportunity to further discover for facts *that are basically in the possession of the defendants.* We conclude from his actions. The specifics are the books that we can introduce into evidence, the Supervisory instructions, the testimony of teachers, students, faculty, and supervisory personnel, and the comment of expert witnesses on this, and the further testimony of scientific expert witnesses concerning the competing scientific models of evolutionism and creationism. The Defendant wants in our petition what we want the trial for. However, there are enough facts, and more, in both Plaintiff's Petitions as well as in Intervening Plaintiff's Motion for New Trial to lift their position above the "conclusory" charge of the State.

In replying to the State's raspberry analogy on Page 11, we would respond that if the State's Established Religion —whether they wanted to admit it or not—was eating raspberries, and the State proceeded to stuff those raspberries down the throats of school children to the exclusion of all other food, which said other food was a part of the school children's religion, then we would consider filing an Amicus Curiae Brief in that case on the side of the school children protesting said stuffing. Since we are not concerned with raspberry containers, but rather with what the minds of children contain, we have alleged our burden under the Clauses of the First Amendment.

On Page 12, the State once more wishes us to fight the battle of classification on the battleground of his categories, not recognizing that there is another. The burden is not arbitrariness or capriciousness. The burden is whether or not the four tests of neutrality are violated,

and whether or not there is compulsion or coercion with reference to the Free Exercise Clause. The State has attacked our Petition For Certiorari because it first misunderstood it. In this misunderstanding, it misstated and misclassified our position. Had the State investigated more thoroughly its own practices, and understood our position, it might have achieved the neutrality it espoused.

REPLY TO THE ANSWER OF THE HOUSTON INDEPENDENT SCHOOL SYSTEM TO APPELLANT'S PETITION FOR CERTIORARI

Although the State of Texas has answered on the lines of their arbitrary either-or type of classification, the Houston Independent School System answers by misapplying three cases. The first is *Epperson v. Arkansas,* 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 2288 (1968). The case in effect struck down a State statute making the teaching of evolution a criminal offense. From this, H.I.S.D. concludes that the objective teaching of both scientific models of thought in a manner that established no particular form of religion would be violative of *Epperson.* Somewhere, H.I.S.D. slipped a minor premise. We again assert that the doctrine of Neutrality with its four tests as set out in our Petition, with the further test of objectivity of *Schempp,* and the intent and language of *Yoder* control.

The next misapplied case is *Barusca v. State of Missouri,* 332 F. Supp. 275 (E.D. Mo., affirmed Three Judge Court, 1971). The petitioners seemingly wanted money from the state to aid them religiously or a credit on their taxes. The implication that that is what we want or something similar is plainly not so. We feel that we have made it abundantly clear that we do not want either religious

thought established as the State's religion—the position that evolution now holds. Seemingly neither the State nor H.I.S.D. understands that *objectivity* is *not establishment.* Nor have they understood the converse that the lack of objectivity coupled with the manner of teaching in Evolution's case is Establishment of Religion and Infringement of the Free Exercise of ours.

Lastly, *Cornwell v. State Board of Education,* 314 F. Supp. 340 (D. Md. 1969 aff'd 428 F.2d 471 (4th Cir.) cert. denied 200 U.S. 942, 91 S.Ct. 240 (1970)), deals with sex education being objected to by the petitioners in that case. This case at bar cannot be compared to sex education anymore than it can be compared to old math vs. new math or raspberry containers. There are many places where sex education differs. There is no great body of scientific knowledge arrayed against sex, neither was the State alleged to be teaching it in a manner where the teaching of it became a religion. If the State in its sexual education courses had attempted to persuade the young students to be male and female prostitutes to the glory of the goddess Diana, then, the Court would surely have taken a different tack.

SUMMARY

Perhaps our position can be illustrated better than further characterization can describe it. Not long ago, it actually happened that a father asked his son who was in the eighth grade of H.I.S.D. how he felt about evolution. His reply was that he did not believe it. Then after a few moments, he said, "If I did, I couldn't believe in God. Isn't that right, Dad." It is our contention that the placing of the child in this kind of dilemma by the religious manner of teaching of evolution is the Establishment of

Religion and an unwarranted infringement upon the Free Exercise Clause in addition to the abridgement of Free Speech.

If Evolution were taught objectively, his answer might have been, "I don't believe in it Dad, because it violates the Second Law of Thermodynamics, and it is inconsistent with certain relative facts of geology, astronomy, and genetics." One's religious faith should not be placed in jeopardy merely because another belief wishes to evangelize by using the means of the State. Evolution as it is taught, destroys faith, and the State has become the adversary of all those conservative religious beliefs that would oppose it.

PRAYER

We once more pray this Court that this petition for the Writ of Certiorari be granted, or in the alternative, the remedy that your petitioner prayed for in their petition be granted, or in the alternative that the case be remanded to the Court for a trial upon the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Appellant's Reply Brief has been served on Mrs. Leona Weber pro se, 6801 Avenue C, Houston, Texas 77011; Mr. Kelly Frels, Attorney for Appellees Houston Independent School District, Et al, 1808 First City National Bank Bldg., Houston, Texas 77002; Mr. Bruce Youngblood, Assistant Attorney General of Texas, Attorney for the State Board of Education, the State Commissioner of Education, and the Central Education Agency, Box 12548, Capitol Station, Austin, Texas by United States Mail with sufficient postage thereon this the 28th day of May, 1974, A.D.

HERBERT L. COFFMAN